PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JAMES M. MALONEY,

Petitioner,

v.

KATHLEEN A. RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

Of Counsel

JAMES M. MALONEY
33 Bayview Avenue
Port Washington, NY 11050
(516) 767-1395

JEFFREY BOSSERT CLARK
Counsel of Record
WILLIAM E. BESTANI
KATHARINE M. BURKE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
202-879-5000

Counsel for Petitioner James M. Maloney

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QUESTIONS PRESENTED

A New York statute makes the possession of a type of weapon known as nunchaku a criminal misdemeanor. Petitioner was arrested in his home and charged with possessing nunchaku. No other conduct, such as misusing the weapon or bearing it in public, was involved. The possession charge was ultimately dropped, though Petitioner was required to destroy the nunchaku.

Desiring to continue freely exercising his individual constitutional right to keep such arms in his home for self-defense, Petitioner brought this declaratory judgment action seeking to have the New York statute pronounced invalid insofar as it applies to criminalize the mere possession of nunchaku in one's home. The Second Circuit held that under this Court's precedent, it was constrained to rule that the Second Amendment does not apply against the States, and dismissed his complaint.

The questions presented are:

1. Whether the Second Amendment's individual right to keep and bear arms is incorporated against the States through the Due Process Clause of the Fourteenth Amendment.

2. Whether the Second Amendment's individual right to keep and bear arms is a privilege or immunity of citizens of the United States applicable to the States under the Privileges or Immunities Clause of the Fourteenth Amendment.

PARTIES TO THE PROCEEDING

Petitioner, James M. Maloney, was plaintiff-appellant below. Respondent, Kathleen A. Rice (in her official capacity as District Attorney of Nassau County, New York) was defendant-appellee below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

INTRODUCTION 1

OPINIONS BELOW 3

JURISDICTION 4

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS 4

STATEMENT OF THE CASE 6

A. Background 6

B. Proceedings Below 13

REASONS FOR GRANTING THE PETITION 15

I. The Circuits Are Divided by the Questions of Whether the Second Amendment Is Incorporated Against the States Through the Due Process Clause of the Fourteenth Amendment and Whether the Courts of Appeals Have Power Even to Reach That Issue. 15

II. The Court Should Also Grant Certiorari Over the Question of Whether the Privileges or Immunities Clause of the Fourteenth Amendment Applies the Second Amendment Against the States. 28

CONCLUSION 37

TABLE OF AUTHORITIES

Page(s)

CASES

Bach v. Pataki,
408 F.3d 75 (2d Cir. 2005) 6, 14

Barron v. Baltimore,
32 U.S. 243 (1833) 30

Benton v. Maryland,
395 U.S. 784 (1969) 18

Corfield v. Coryell,
6 F. Cas. 546,
(C.C.E.D. Pa. 1823) 30, 31, 32

District of Columbia v. Heller,
128 S. Ct. 2783
(2008) ..... *passim*

Dolan v. City of Tigard,
512 U.S. 374 (1994) 24-25

Duncan v. Louisiana,
391 U.S. 145 (1968) 20

Employment Div., Dep't of Human Res. of Or. v. Smith,
485 U.S. 660 (1988) 25

Granholm v. Heald,
544 U.S. 460 (2005) 25

Hurtado v. California,
110 U.S. 516 (1884) 25

In re Kemmler,
136 U.S. 436 (1890) 35

Lochner v. New York,
198 U.S. 45 (1905) 32-33, 34

TABLE OF AUTHORITIES (Cont.)

Page(s)

Love v. Pepersack,
47 F.3d 120 (4th Cir. 1995) 19

In re Maloney,
No. 101898/06, 2006 N.Y. Misc. LEXIS 2464 (N.Y. Sup. Ct. July 16, 2006) 11, 12

Maloney v. Anton Community Newspapers, Inc.,
16 A.D. 3d 465 (N.Y. App. Div. 2005) 12

Maloney v. County of Nassau,
No. 03-CV-4178 (SLT)(MLO), 2007 U.S. Dist. Lexis 71162 (E.D.N.Y. Sept. 24, 2007) 10-11

Maloney v. Cuomo,
554 F.3d 56 (2d Cir. 2009) 3

Maloney v. Cuomo,
470 F. Supp. 2d 205 (E.D.N.Y. 2007) 3

Maxwell v. Dow,
176 U.S. 581 (1900) 34-35

Miller v. Texas,
153 U.S. 535 (1894) 17, 20, 21, 22, 30

Minneapolis & St. Louis R.R. Co. v. Bombolis,
241 U.S. 211 (1916) 25

Murphy v. Hunt,
455 U.S. 478 (1982) 25

TABLE OF AUTHORITIES (Cont.)

Page(s)

National Rifle Ass'n of Am., Inc. v. City of Chicago, No. 08-4241, 2009 WL 1515443 (7th Cir. June 2, 2009) 17-19

Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) 15-17, 20, 22

O'Neil v. Vermont, 144 U.S. 323 (1892) 31

Palko v. Connecticut, 302 U.S. 319 (1937) 18

People v. Davis, 446 N.Y.S. 2d 159 (N.Y. Crim. Ct. 1981) 6

Peoples Rights Org., Inc. v. City of Columbus, 152 F.3d 522 (6th Cir. 1998) 19

Presser v. Illinois, 116 U.S. 252 (1886) 14, 17, 20, 21, 22, 30

Rodriguez de Quijas v. Shearson/American Expr., Inc., 490 U.S. 477 (1989) 17-18, 20, 21, 22

Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872) 28, 29, 31, 32, 33, 34, 35, 36

Thomas v. Members of the City Council of Portland, 730 F.2d 41 (1st Cir. 1984) (per curiam) 19

Twining v. New Jersey, 211 U.S. 78 (1908) 34-35

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Carlton,
512 U.S. 26 (1994) 29

United States v. Cruikshank,
92 U.S. 542 (1876) 17, 20, 21, 22, 30

United States v. Emerson,
270 F.3d 203 (5th Cir. 2001) 20-21

Walker v. Sauvinet,
92 U.S. 90 (1875) 35

Washington v. Glucksberg,
521 U.S. 702 (1997) 20

CONSTITUTIONAL PROVISIONS

U.S. Const., art. IV, sec. 2, cl. 1 32

U.S. Const., amend. II ..... *passim*

U.S. Const., amend. XIV 1-4, 13, 15, 23-25, 28-36

FEDERAL STATUTE

28 U.S.C. § 1254 14

FEDERAL LEGISLATIVE HISTORY

CONG. GLOBE, 39th Cong., 1st Sess.
(1866) 2, 23, 24, 30

CONG. GLOBE, 39th Cong., 2d Sess.(1867) 30

CONG. GLOBE, 42nd Cong., 1st Sess.(1871) 30

NEW YORK STATUTES

New York Penal Law § 10.00(3) 12

New York Penal Law § 10.00(6) 12

TABLE OF AUTHORITIES (Cont.)

Page(s)

New York Penal Law § 240.20 12

New York Penal Law § 265.00(14) 5

New York Penal Law § 265.01 ..... 5, 6, 9, 28

New York Penal Law § 265.01(1) 9

New York Penal Law § 265.20 ..... 5, 6

New York Penal Law § 265.20(3) 6

New York Penal Law § 265.20[a][1b] 6

1974 N.Y. Laws 895 (chapter 179) 9

NEW YORK EXECUTIVE MATERIAL

N.Y. Op. Atty. Gen. (Inf.) 247 (Dec. 8, 1980) 6

SECONDARY SOURCES

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AKHIL REED AMAR,
THE BILL OF RIGHTS (1998) 35-36

ALAN AXELROD,
THE REAL HISTORY OF THE AMERICAN REVOLUTION: A NEW LOOK AT THE PAST (2007) 27

Winston Churchill,
Liberty and the Law (given July 31, 1957), *in* 8 ROBERT RHODES JAMES, ed., WINSTON CHURCHILL: HIS COMPLETE SPEECHES 1897-1963 (1974) 24

PAUL CROMPTON,
THE COMPLETE MARTIAL ARTS (1989) 7, 8, 28

TABLE OF AUTHORITIES (Cont.)

Page(s)

JOHN HART ELY,
DEMOCRACY AND DISTRUST (1980) 29

THE FEDERALIST Nos. 51 & 62 (E.G. Bourne, ed. 1901) 1

IAIN HOGG,
THE ENCYCLOPEDIA OF WEAPONRY (2006) 27

GEORGE KERR, OKINAWA: THE HISTORY OF AN ISLAND PEOPLE (1958) 6, 7

JOSEPH STORY,
COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897 (4th ed. 1873) 2

LAURENCE H. TRIBE,
AMERICAN CONSTITUTIONAL LAW (3d ed. 2000) 29

HENRY ST. GEORGE TUCKER,
BLACKSTONE'S COMMENTARIES: WITH NOTE OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA (1803) 1

Scholarly Articles

Robert J. Cottrol & Raymond T. Diamond,
The Second Amendment: Toward an Afro-Americanist Reconsideration,
80 GEO. L.J. 309 (1991) 23

TABLE OF AUTHORITIES (Cont.)

Page(s)

Stephen Halbrook,
Oriental Philosophy, Martial Arts and Class Struggle, SOCIAL PRAXIS (1974) 6, 7

Eugene Volokh,
State Constitutional Rights to Keep and Bear Arms,
11 TEXAS REV. OF L. & POL. 191 (2006) 1

Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999 (2005) 19

Newspaper Articles

Editorial, THE LOYAL GEORGIAN (Augusta) (Feb. 3, 1866) 23

More Police are Using Nunchakus,
PHILA. INQUIRER (Feb. 5, 1989) 7

Internet

Denver Police Department 2000-2002 Accomplishments (Jan. 1, 2003),
http: //www.denvergov.org/Portals/295/documents/Accompfinal.pdf
(last visited June 25, 2009) 7

Orcutt Police Nunchaku System,
http://www.orcuttopn.com/about.htm
(last visited June 25, 2009) 7

APPENDIX CONTENTS

Opinion of the Court of Appeals
(January 28, 2009) 1a

TABLE OF AUTHORITIES (Cont.)

Page(s)

Order of the District Court on Motion for Reconsideration (May 14, 2007) 8a

Order of the District Court Dismissing Petitioner's Amended Complaint (January 17, 2007) 14a

Order of the District Court Denying Petitioner's Motion for Summary Judgment and Granting Petitioner Leave to File an Amended Complaint (August 31, 2005) 34a

Amended Complaint (September 3, 2005) 45a

Complaint (February 18, 2003) 61a

Letter from Benjamin Levine, Chairman, Committee on State Legislation, New York County Lawyers' Association to Hon. Malcolm Wilson, Governor of N.Y. (May 3, 1974) 72a

Report from Gregory J. Perrin, Chairman, Committee on the Criminal Court, New York County Lawyers' Association (April 29, 1974) 73a

Memorandum for the Governor from Louis J. Lefkowitz, Attorney General of N.Y. (April 8, 1974) 75a

TABLE OF AUTHORITIES (Cont.)

Page(s)

Memorandum from Archibald R. Murray, N.Y. Executive Department, Division of Criminal Justice Services to Michael Whiteman (April 4, 1974) 77a

Letter from Richard C. Ross, Assemblyman 88th District to Michael Whiteman, Executive Chamber (April 2, 1974)..... 80a

Letter from B. Anthony Morosco, Legislative Secretary, District Attorneys Association to Hon. Michael Whiteman, Executive Chamber (April 1, 1974) 82a

Letter from Albert M. Rosenblatt, District Attorney of Dutchess County, N.Y. to Hon. Michael Whiteman, Executive Chamber (April 1, 1974) 83a

Pertinent Statutory Provision 84a

INTRODUCTION

"A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed." U.S. Const., amend. II. Writing in 1803, the esteemed editor of the "American Blackstone," William and Mary law professor St. George Tucker proclaimed that this constitutional guarantee "may be considered as the true palladium of liberty . . . . The right of self-defence is the first law of nature: in most governments it has been the study of rulers to confine this right within the narrowest limits possible."[1] Such confinement was never to be imposed by a ruling class on the "compound republic of America,"[2] where the Founders sought to shelter the right of self-defense from degradation both by means of constitutional structure and the Bill of Rights, and where similar state constitutional or common law rights were and are legion. Eugene Volokh, *State Constitutional Rights to Keep and Bear Arms*, 11 TEXAS REV. OF L. & POL. 191, 205 (2006) (44 States have constitutional guarantees similar to the Second Amendment).

Both the history of the 1866 Freedmen's Bureau Act and the 1868 Fourteenth Amendment to the

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[1] 1 HENRY ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE TO THE CONSTITUTION AND LAWS OF THE FEDERAL GOVERNMENT OF THE UNITED STATES AND THE COMMONWEALTH OF VIRGINIA, at App. 300 (1803), *quoted in District of Columbia v. Heller*, 128 S. Ct. 2783, 2805 (2008)).

[2] THE FEDERALIST No. 51 at 356, No. 62 at 422 (E.G. Bourne, ed. 1901).

Constitution reveal that the Reconstruction Congress still firmly believed, decades after the Founding, that the palladium[3] of the Second Amendment is most prominent in protecting the lawful possession of weapons kept for self-defense in the home. "[T]he founding generation 'were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense.'"[4] The citizen's "right to bear arms for the defense of himself and family and his homestead" was "indispensable."[5] "The great object of the first section of this [Fourteenth] amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees [among which are]," CONG. GLOBE, 39th Cong., 1st Sess., 2766 (1866) (Sen. Howard), "the right to keep and to bear arms," *id.* at 2765.

* * *

In this case, the Court should use its

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[3] Justice Story also likened the Second Amendment to the warding effect of the statue of Pallas Athena in classical Troy, calling the Second Amendment a "strong moral check against the usurpation and arbitrary power of rulers" — an attainable goal only if the right to keep and bear arms is an individual right that stands free of military service to the government. 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1897, at 620 (4th ed. 1873), *quoted in Heller*, 128 S. Ct. at 2840 (Stevens, J., dissenting).

[4] *Heller*, 128 S. Ct. at 2810 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 362, 371 (1866) (Sen. Davis)).

[5] *Heller*, 128 S. Ct. at 2811 (quoting CONG. GLOBE, 39th Cong., 1st Sess., 1182 (1866) (Sen. Pomeroy)).

discretionary authority to settle a question that has divided the Courts of Appeals in the wake of *District of Columbia v. Heller* — whether the ratification of the Fourteenth Amendment in 1868 made clear that the Second Amendment liberty, first chartered in writing in 1791, thereby became fully applicable against the States. For, in this case, Petitioner James M. Maloney seeks a judicial declaration vindicating his constitutional right to self-defense and to the possession of weapons in his home against a modern incursion by the State of New York. Three decades ago New York criminalized the mere possession of an entire category of blunt weapons predominantly designed for defensive purposes. Consistent with the Fourteenth Amendment, state statutes that criminalize the simple ownership of a personal weapon of self-defense cannot stand. They are a foundational affront to the liberties of a free people. *Heller*, 128 S. Ct. at 2800 (equating the Second Amendment's phrase "security of a free State" to the "security of a free polity").

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 554 F.3d 56 (2d Cir. 2009), and reprinted in the Appendix ("App.") at 1a-7a.

The United States District Court for the Eastern District of New York's unpublished order denying Petitioner's motion for summary judgment and granting Petitioner leave to file an amended complaint is reprinted at App. 34a-44a. The district court's second order dismissing Petitioner's amended complaint is reported at 470 F. Supp. 2d 205 (E.D.N.Y. 2007) and reprinted at App. 14a-33a. The

district court's unpublished order denying Petitioner's motion for reconsideration is reprinted at App. 8a-13a.

JURISDICTION

The Second Circuit entered judgment on January 28, 2009 in an appeal arising from a case premised on federal-question jurisdiction. On April 20, 2009, Justice Ginsburg granted Petitioner's request for an extension of time to file this petition for a writ of certiorari, up to and including June 26, 2009. This Court has jurisdiction under 28 U.S.C. § 1254.

PERTINENT STATUTORY AND CONSTITUTIONAL PROVISIONS

The Second Amendment to the Constitution of the United States provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

The first section of the Fourteenth Amendment to the Constitution of the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its

> jurisdiction the equal protection of the laws.

The ban on possession of certain weapons in the New York Penal Law Section 265.01 provides in relevant part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He or she possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, plastic knuckles, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or 'Kung Fu star.'
>
> ***
>
> Criminal possession of a weapon in the fourth degree is a class A misdemeanor.

New York Penal Law Section 265.00(14) defines a "chuka stick" as follows:

> [A]ny device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. . . .

New York Penal Law Section 265.20 sets out numerous exemptions to New York Penal Law

Section 265.01. Section 265.20 is reprinted in the Appendix at 84a. As described in *Bach v. Pataki*, 408 F.3d 75, 78-79 (2d Cir. 2005), New York Penal Law Article 400 provides for the licensing of firearm use, which is one of the exceptions to New York Penal Law Section 265.01. New York Penal Law § 265.20(3) (McKinney 2008). None of the defined exemptions apply to "chuka sticks," although New York Penal Law Section 265.20[a][1b] contains an exception that has been interpreted to allow police officers to possess such weapons. *See also* 1980 N.Y. Op. Atty. Gen. (Inf.) 247 (Dec. 8, 1980). Section 265.01 is not limited by a scienter requirement. *People v. Davis*, 446 N.Y.S. 2d 159, 161 (N.Y. Crim. Ct. 1981). The provision thus creates a strict-liability crime.

STATEMENT OF THE CASE

A. Background

1. Nunchaku are a martial-arts weapon consisting of two sticks connected together at one end by a short length of chain or rope. As the district court found, "the martial arts generally, and perhaps use of nunchaku in particular, have a rich history and are culturally significant to many people in many parts of the world." App. 30a. The use of nunchaku as a weapon appears to have originated in Okinawa in the early seventeenth century around the time of a Japanese invasion of that island. Stephen Halbrook, *Oriental Philosophy, Martial Arts and Class Struggle*, 2 SOCIAL PRAXIS, 139-40 (1974) [hereafter "*Martial Arts* at __"]; *see also* GEORGE KERR, OKINAWA: THE HISTORY OF AN ISLAND PEOPLE 156-160 (1958).

To suppress the possibility of internal dissent in a type of abuse of power familiar to the Founding Fathers from English history, the Japanese government prohibited the conquered from carrying or possessing weapons. *Id.*; *see also* PAUL CROMPTON, THE COMPLETE MARTIAL ARTS 63 (1989) [hereafter "CROMPTON at __"]. In response, martial arts systems were developed using non-prohibited items such as farm tools. *Martial Arts* at 140; CROMPTON at 63. Nunchaku were among those improvised weapons, evolving from a rice-threshing device or from a crude bridle for an agricultural beast of burden. *Martial Arts* at 140; *More Police are Using Nunchakus*, PHILA. INQUIRER, A05 (Feb. 5, 1989) [hereafter "*Police Nunchakus*, at __"].

2. Although nunchaku can be used offensively, it originated as and is utilized by modern martial artists primarily as a means of self-defense. *Martial Arts* at 140. Unsurprisingly, then, nunchaku are also currently used by over two-hundred police forces across the country for control of and/or self-defense against unarmed attackers.[6] As noted above, the

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[6] *See generally Police Nunchakus* ("Hundreds of police officers now swear by the weapon."). For instance, Sergeant Kevin Orcutt, a Colorado policeman, has developed a popular training system for nunchaku use by law enforcement officers as a non-lethal technique to control and subdue. Since 1985, nearly 200 law enforcement agencies across the country have employed his "Orcutt Police Nunchaku system." *See* <<http://www.orcuttopn.com/about.htm>> (last visited June 25, 2009). The Denver Police Department, *inter alia*, has touted the use of Orcutt's system. *See Denver Police Department 2000-2002 Accomplishments*, 15 (Jan. 1, 2003), *available at* <<http://www.denvergov.org/Portals/295/documents/Accompfinal.pdf>> (last visited June 25, 2009).

New York Attorney General has determined that state and municipal police in New York may possess and use nunchaku in the course of their duties. *Supra* at 6.

3. New York first proposed criminally banning the possession or use of nunchaku in 1973, but the ban did not pass until 1974. App. 76a. Contrary to the weapon's history as a device to subdue[7] and its later authorized use by New York police forces for the same purpose, state legislators concluded that a pair of nunchaku "is designed primarily as a weapon and has no purpose other than to maim, or in some instances, kill," App. 81a. *See also* App. 83a ("There is no conceivable innocent use[] for this device, and accordingly, there can be no possible invasion of anyone's right to use it innocently"). Oddly, a significant impetus for the prohibition on nunchaku possession appears to have been negative perceptions of the weapon formed from the 1973 martial-arts film, *Enter the Dragon*, starring Bruce Lee. *See, e.g.,* CROMPTON at 63; App 82 (excerpts from the New York Governor's "Bill Jacket").

There was an important minority view, however. Archibald Murray of the State of New York's Executive Department's Division of Criminal Justice Services questioned the proposed legislation. Mr. Murray noted that nunchaku have peaceable and non-criminal uses in martial-arts training. "In view

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[7] *See also* App. 66a ("The nunchaku, unlike most other weapons, including firearms, knives, swords and all other penetrating weapons, is capable of being used in a restrained manner such that an opponent may be subdued without resorting to the use of deadly physical force.").

of the current interest and participation in these activities by many members of the public, it appears unreasonable — and perhaps even unconstitutional — to prohibit those who have a legitimate reason for possessing chuka sticks from doing so." App. 77a-78a.

Mr. Murray also suggested various less-restrictive alternatives for regulating illegitimate nunchaku use, including the addition of a scienter requirement. App. 78a. The New York County Lawyers Association also recommended that the Governor veto the anti-nunchaku bill, noting that the bill would make "mere possession (even absent criminal intent) a criminal offense" and that "a more narrowly drawn statute can be fashioned" to achieve the legislature's desire "to prohibit the use of nunchakus in criminal conduct." App.74a.

Nevertheless, the New York State Assembly enacted (and Governor Malcolm Wilson signed) the anti-nunchaku legislation that is presently codified in New York Penal Law Section 265.01. 1974 N.Y. Laws 895 (chapter 179) (enacted Apr. 16, 1974) (effective Sept. 1, 1974).

In its present form, Section 265.01 makes any possession of a listed weapon, including nunchaku and all firearms, a misdemeanor (termed "criminal possession of a weapon in the fourth degree"). N.Y. Penal Law § 265.01(1) (McKinney 2008). The elements of Section 265.01(1) do not include proving the carrying or use of nunchaku. A violation occurs automatically under this section when an individual merely "possesses any . . . chuka stick." App. 36a-37a.

4. Petitioner James M. Maloney has practiced

various forms of martial arts involving nunchaku since he was a teenager. App. 64a. He also maintains a strong interest in continuing to do so, and cannot conveniently relocate from Nassau County, New York to a State that does not impose a *per se* ban on private nunchaku use. App. 65a.

As Mr. Maloney averred in his complaint, he "first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because [his] father, John Maloney, had been fatally stabbed in 1964 . . . ." App. 64a-65a. As a trained New York City 911 Emergency Medical Services system paramedic, Mr. Maloney has also personally observed numerous stab wounds inflicted by knives or other sharp objects.

Currently, Mr. Maloney is an officer in the U.S. Naval Reserve, a member in good standing of the bar of New York and various federal bars, and a practicing maritime lawyer, holding a J.D. from Fordham University and an LL.M. from the New York University School of Law.

5. Following a dispute between Mr. Maloney and a telephone line worker who was working on a platform outside Mr. Maloney's home on August 23, 2000, the police were summoned and eventually admitted to his residence, whereupon they conducted a search and found the nunchaku that Mr. Maloney owned for purposes of self-defense and martial-arts training. *Maloney v. County of Nassau*, No. 03-CV-4178 (SLT)(MLO), 2007 U.S. Dist. Lexis 71162, at *2 (E.D.N.Y. Sept. 24, 2007).

Police had become involved after the telephone

worker claimed that Mr. Maloney had pointed a rifle at him from within the home. *Id.* at *2. When the police arrived at Mr. Maloney's home, they did not have a search warrant, so Mr. Maloney repeatedly refused them entry. *Id.* at *3. A team of police surrounded his dwelling and nonetheless persisted — for nearly twelve hours — in calling for Mr. Maloney to exit his home and surrender to them. After consulting with counsel and his rabbi, Mr. Maloney finally surrendered into the custody of police at approximately 2 a.m. on the morning of August 24, 2000. *Id.*

Nassau County and Mr. Maloney dispute the circumstances surrounding Mr. Maloney's wife's decision to later consent to the police entering their home. As the Eastern District of New York noted, "[i]t is readily apparent from the face of the documents and from the Declaration of [Mr. Maloney's wife] . . . that there are substantial issues concerning the scope, voluntariness and validity of [her] consent." *Id.* at *22.

Police searched the home, finding the nunchaku under a couch. Police also seized from Mr. Maloney's locked safe three revolvers, two inoperable and one operable, all purchased legally by Mr. Maloney in either Florida or New Jersey years before. Regarding Mr. Maloney's interaction with the telephone worker, the Supreme Court of New York for New York County concluded as follows: "It is undisputed . . . that petitioner did not have a rifle, and that he had not pointed any weapon at the telephone worker." *In re Maloney*, No. 101898/06, 2006 N.Y. Misc. LEXIS 2464, at *6 (N.Y. Sup. Ct. July 16, 2006).

6. "On August 24, 2000, the plaintiff was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree for possessing a nunchaku in his home in violation of New York Penal Law § 265.01." App. 16a-17a. As the District Court below recognized, the criminal possession charge against Petitioner was "based solely on in-home possession, and not supported by any allegations that [he] had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku. Thus, the only criminal activity alleged against [him] was his possession of the nunchaku in his home." App. 17a.

7. Seeking to call a halt to an unfortunate incident that had upended his life and exposed him to adverse media coverage for more than two years, on January 28, 2003 Mr. Maloney agreed to plead to a single disorderly conduct violation — an offense not amounting to a crime under New York law. App. 17a; New York Penal Law Sections 10.00(3), (6) & 240.20. Under the agreement, the criminal charges against Mr. Maloney were dismissed. App. 17a. Mr. Maloney did note at allocution on the violation charge that the resulting search of his home had uncovered a .38 caliber revolver. *Maloney v. Anton Community Newspapers, Inc.*, 16 A.D. 3d 465, 466 (N.Y. App. Div. 2005). But the New York Supreme Court later specifically concluded that the "'underlying facts and circumstances' [concerning the revolver also involved] no more than mere possession." *In re Maloney*, 2006 N.Y. Misc. LEXIS 2464, at *6. After receiving Mr. Maloney's plea, the

court ordered the "destruction of the nunchaku confiscated at the time of his August 24, 2000 arrest [and] a fine in the amount of $310." App. 18a.

B. Proceedings Below

1. To vindicate his constitutional rights, Petitioner filed a *pro se* complaint on February 18, 2003 in the United States District Court for the Eastern District of New York. Mr. Maloney sought a declaration "that N.Y. Penal Law §§ 265.00 through 265.02 are unconstitutional insofar as they punish possession of nunchakus in one's home." App. 2a-3a. From the outset of the case, Mr. Maloney has maintained that the provisions of New York law flatly banning nunchaku violate the Second Amendment as applicable against the States pursuant to the Due Process and/or Privileges or Immunities Clauses of the Fourteenth Amendment. App. 68a, 70a-71a (¶¶ 31-32, 39-40, 43-44).

On August 31, 2005, the District Court denied Petitioner's motion for summary judgment, reasoning that Petitioner lacked standing to pursue claims against the Attorney General. App. 43a The District Court, however, granted Petitioner leave to file an amended complaint. App. 43a-44a.

On September 3, 2005, Petitioner filed his amended complaint, this time adding as a defendant the District Attorney of Nassau County, who had undisputed authority to enforce the statutory bar on the possession of nunchaku by Mr. Maloney at his residence. App. 45a-60a.

2. The Eastern District of New York dismissed Petitioner's amended complaint on January 17, 2007. App. 32a. The district court found that the

nunchaku prohibition did not abridge Petitioner's rights to keep and bear arms under the United States Constitution because the Second Amendment "imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku." App. 31a. The district court relied on controlling precedent in the Second Circuit, which in turn relied on this Court's decision in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), to hold that "the Second Amendment's right to keep and bear arms imposes a limitation on federal, not state, legislative efforts." App. 31a (quoting *Bach v. Pataki*, 408 F.3d at 84). On May 14, 2007, the district court denied reconsideration. App. 13a.

3. On appeal, the Second Circuit affirmed the dismissal of Mr. Maloney's complaint in a brief *per curiam* opinion. App. 1a-7a. Like the district court, the Second Circuit relied on *Presser* to find "that the Second Amendment applies only to limitations the federal government seeks to impose on this right." App. 4a. The Second Circuit opined:

> [W]e must follow *Presser* . . . . [T]he Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.

App. 4a-5a (citing *Bach* 408 F.3d at 86) (internal citations omitted).

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE DIVIDED BY THE QUESTIONS OF WHETHER THE SECOND AMENDMENT IS INCORPORATED AGAINST THE STATES THROUGH THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT AND WHETHER THE COURTS OF APPEALS HAVE POWER EVEN TO REACH THAT ISSUE.

In the wake of this Court's decision in *Heller* that the Second Amendment confers an individual right to keep and bear arms, 128 S. Ct. at 2799, 2816, three Circuits have addressed the question of whether the Second Amendment applies against the States. Each has approached the question very differently.

1. In a challenge to an Alameda County, California ordinance prohibiting the possession of firearms or ammunition on county property, the Ninth Circuit concluded that it was free to reach the issue of whether the Second Amendment was selectively incorporated against the States by the Fourteenth Amendment's Due Process Clause because this Court had never resolved that question. Instead, the Ninth Circuit emphasized that this Court had explicitly rejected only arguments for the ***direct application*** of the Second Amendment to the States and incorporation through the Privileges or Immunities Clause. *Nordyke v. King*, 563 F.3d 439, 447-49 (9th Cir. 2009).

After an extensive historical and legal analysis, the Ninth Circuit held that the Second Amendment was incorporated against the States under the Due Process Clause's selective incorporation doctrine

because it was (i) a "fundamental right" (ii) "necessary to an Anglo-American regime of ordered liberty," as well as (iii) "deeply rooted in this Nation's history and tradition." *Id.* at 449-457. The Ninth Circuit nevertheless rejected the Second Amendment challenge on the merits to the Alameda County ordinance restricting gun possession on county property under the "sensitive places" exception referenced in *Heller*. *Nordyke*, 563 F.3d at 459-460 (quoting *Heller*, 128 S. Ct. at 2816-17) ("nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings").

Judge Gould concurred fully in the *Nordyke* majority opinion written by Judge O'Scannlain. But Judge Gould also emphasized his view that modern America in the international Age of Terrorism needs the Second Amendment every bit as much as it did in the Age of Enlightenment:

> The right to bear arms is a bulwark against external invasion. We should not be overconfident that oceans on our east and west coasts alone can preserve security. We recently saw in the case of the terrorist attack on Mumbai that terrorists may enter a country covertly by ocean routes, landing in small craft and then assembling to wreak havoc.
>
> * * *
>
> [T]he right to bear arms is also a protection against the possibility that even our own government could degenerate into tyranny, and though

> this may seem unlikely, this possibility should be guarded against with individual diligence.

Nordyke, 563 F.3d at 464 (Gould, J., concurring).

2. The Seventh Circuit disagreed with the Ninth Circuit, noting that it was bound by Supreme Court precedent to hold "that the Second Amendment applies only to the Federal Government." *National Rifle Ass'n of Am., Inc. v. City of Chicago*, --- F.3d ---, No. 08-4241, 2009 WL 1515443, at *2 (7th Cir. 2009) (quoting *Heller*, 128 S. Ct. at 2813, n.23). "The Supreme Court has rebuffed requests to apply the second amendment to the states. *United States v. Cruikshank*, 92 U.S. 542 (1876); *Presser v. Illinois* [and] *Miller v. Texas*, 153 U.S. 535 (1894)." *National Rifle Ass'n*, 2009 WL 1515443, at *1. The Seventh Circuit's case involved consolidated challenges to Chicago and Oak Park, Illinois ordinances outright prohibiting or placing registration limitations on firearm possession — effectively banning most handguns. *National Rifle Ass'n*, 2009 WL 1515443, at *1.

Specifically, the Seventh Circuit rejected the Ninth Circuit's view that because *Cruikshank*, *Presser*, and *Miller* were decided before the advent of twentieth-century selective incorporation doctrine, the lower federal courts were free to apply the Second Amendment to the States. Writing for the court, Judge Easterbrook argued: "If a court of appeals could disregard a decision of the Supreme Court by identifying, and accepting, one or another contention not expressly addressed by the Justices, the Court's decisions could be circumvented with ease. They would bind only judges too dim-witted to

come up with a novel argument." *Id.* (citing *Rodriguez de Quijas v. Shearson/American Expr., Inc.*, 490 U.S. 477, 484 (1989)).

Immediately after extolling the virtues of judicial restraint at the circuit level, however, the Seventh Circuit ironically launched into four observations in *dicta*, each seriously questioning whether applying the Second Amendment to the States would be appropriate. Judge Easterbrook asserted:

> (1) selective incorporation cannot "be reduced to a formula" that resorts to historical analysis;[8]
>
> (2) reliance on Blackstone cannot make the historical case for incorporation because Blackstone held many legal opinions that American courts have never regarded as correct;[9]
>
> (3) this Court could perhaps conclude that (a)

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[8] "*Palko v. Connecticut*, 302 U.S. 319, 325 (1937) . . . was overruled in an opinion that paid little heed to history. *Benton v. Maryland*, 395 U.S. 784 (1969)." *National Rifle Ass'n*, 2009 WL 1515443, at *3.

[9] "Blackstone also thought determinate criminal sentences (e.g., 25 years, neither more nor less, for robbing a post office) a vital guarantee of liberty. That's not a plausible description of American constitutional law." *National Rifle Ass'n*, 2009 WL 1515443, at *3. Judge Easterbrook's disdain for historical analysis of American constitutionalism grounded on Blackstone should be contrasted with this Court's use of Blackstone in *Heller* and elsewhere. For instance, the *Heller* majority invoked Blackstone at least eight times. *See* 128 S. Ct. at 2792, 2798-2800, 2805, 2807, 2816-17. Justice Stevens's dissent in *Heller* also countered multiple times with its own invocations of Blackstone. *See* 128 S. Ct. at 2837-38, 2845 (Stevens, J., dissenting).

States should be able to decide that protecting long gun rights is more important to vibrant militias than handgun rights, or (b) States should be able to enact laws requiring "that people cornered in their homes must surrender rather than fight back,"[10] *National Rifle Ass'n*, 2009 WL 1515443 at *3-*4; and

(4) "[f]ederalism is an older and more deeply rooted tradition than is a right to carry any particular kind of weapon." *Id.* at *4.[11]

3. Issued before either *Nordyke* or *National Rifle Association*, the Second Circuit's decision in this case represents the remaining constituent of the three-circuit split in post-*Heller* incorporation authority.[12] In its *per curiam* opinion, the Second Circuit neither attempted to apply selective

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[10] The Seventh Circuit's speculations should be compared to Shlomit Wallerstein, *Justifying the Right to Self-Defense: A Theory of Forced Consequences*, 91 VA. L. REV. 999, 999 (2005) (noting that every State recognizes self-defense as a defense to crimes of personal violence).

[11] This position seems to have matters precisely backward — the Fourteenth Amendment is a constraint on the parameters of federalism; federalism does not confine the reach of the Fourteenth Amendment.

[12] If pre-*Heller* decisions are counted, three circuits holding that the Second Amendment does not apply against the States must be added to the split. *See Peoples Rights Org., Inc. v. City of Columbus*, 152 F.3d 522, 539 n.18 (6th Cir. 1998); *Love v. Pepersack*, 47 F.3d 120, 123-24 (4th Cir. 1995); *Thomas v. Members of the City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) (per curiam).

incorporation doctrine, nor venture its views on such matters in *dicta*. Instead, it invoked the *Rodriguez de Quijas* principle in a straightforward fashion to find that it was bound by this Court's trilogy of cases in *Cruikshank*, *Presser*, and *Miller*. "It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right." App. 4a. This was because *Heller* "did not present the question of whether the Second Amendment applies to the states." *Id.* (citing *Heller*, 128 S. Ct. at 2813 n.23).

Judged against its sister circuits, the Second Circuit would seem to have taken the most defensible approach. Judicial restraint and the ready allegiance the lower courts must confess to the superintendence of this Court require that if *Cruikshank*, *Presser*, and *Miller* are to be pronounced overtaken by modern selective incorporation doctrine under *Duncan v. Louisiana*, 391 U.S. 145 (1968), or substantive due process doctrine under *Washington v. Glucksberg*, 521 U.S. 702 (1997) — the two strands of constitutional analysis on which *Nordyke* is grounded — only this Court may do so.[13]

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[13] Suggesting, however, that reasonable minds may differ as to how the *Rodriguez de Quijas* principle maps on to the issue of this Court's precedent regarding Second Amendment applicability against the States, it should be noted that the Fifth Circuit announced a similar analysis before the Ninth did (albeit in *dicta*, since the Fifth Circuit was dealing with the constitutionality of a federal gun statute). *See United States v. Emerson*, 270 F.3d 203, 221 n.13 (5th Cir. 2001) ("As these holdings [in *Cruikshank*, *Presser*, and *Miller*] all came well before the Supreme Court began the process of incorporating

But do so it must. In light of this circuit split following closely on the heels of *Heller*, the Court must now revisit — for the first time since the nineteenth century — the issue of whether Second Amendment rights apply against the States.

Deep confusion owing to what is, in effect, a three-way split in the Courts of Appeals presently reigns:

- The Second Circuit has held that the *Rodriguez de Quijas* principle of judicial hierarchy, together with *Cruikshank*, *Presser*, and *Miller*, precludes lower court incorporation of the Second Amendment.

- The Seventh Circuit agrees, but also appears to think, in significant tension with *Heller*, that the right of self-defense by force of arms is quaint and that to recognize it as applicable to the States would represent an assault on federalism.

- Finally, the Ninth Circuit believes that *Rodriguez de Quijas* is inapplicable and that the historical and legal case for Second Amendment incorporation under this Court's modern lines of due process cases is clear.

The question of applicability of *Rodriguez de*

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certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment, and as they ultimately rest on a rationale equally applicable to all those amendments, none of them establishes any principle governing any of the issues now before us.").

Quijas means that even if the Ninth Circuit vacates the *Nordyke* panel decision and grants rehearing *en banc*,[14] this Court should still take up the pressing constitutional issue of the Second Amendment's reach without delay. For if *Rodriguez de Quijas* applies here, then a circuit split would normally be impossible. Hence, this Court should not hold up resolution of the issue of incorporation to see if further conflict develops (or persists). The residents of the 50 States should not be forced to wait for one or more circuits to hazard disobedience to *Cruikshank*, *Presser*, and *Miller* (and to *Rodriguez de Quijas* in the process), before they can know if they are truly entitled to partake in the same precious Second Amendment liberties that District of Columbia residents now enjoy under *Heller*.

4. While the Court should grant certiorari in this case because of the conflicts between the circuits on the questions of (i) whether the Due Process Clause selectively incorporates the Second Amendment and (ii) how *Rodriguez de Quijas* applies to that issue, this case also readily meets the test of exceptional importance. "[W]hatever else [the Second Amendment] leaves to further evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home." *Heller*, 128 S. Ct. at 2821. Citizens of the 50 States have their own hearths and homes to defend that are every bit as worthy of protection as those of the District's residents.

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[14] *See* Order, in *Nordyke v. King*, No. 07-15763 (9th Cir. May 18, 2009) (calling for simultaneous briefing on whether to rehear the case *en banc*).

5. Laws in the South prohibiting "freedmen" from keeping any arm were typical during and following the Civil War era. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 345 n.176 (1991) (highlighting a Louisiana statute declaring that "[n]o Negro who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons . . ." were common).

As this Court recognized in *Heller*, an outcry over the routine disarmament of the freedmen ensued. As one newspaper declared, "[a]ll men, without distinction of color, have the right to keep arms to defend their homes, families or themselves." *Editorial*, THE LOYAL GEORGIAN (Augusta), at 3, col. 4 (Feb. 3, 1866). Statements such as these were prevalent in the debate surrounding the adoption of the Fourteenth Amendment and its statutory precursors. Senator Raymond, for example, noted that:

> [A freed slave and his descendants have] every right which you or I have as citizens of the United States under the laws and constitution of the United States . . . . He has defined status; he has a country and a home; a right to defend himself and his wife and children; a right to bear arms.

CONG. GLOBE, 39th Cong., 1st Sess. 1266 (Mar. 8, 1866) (emphasis added).

Accordingly, it is beyond dispute that the Fourteenth Amendment was adopted to protect newly freed slaves from the depredations of the

formerly Confederate States, including specifically their disregard for the right to keep and bear arms. The proponents of the Fourteenth Amendment made clear their belief that "the right to keep and to bear arms" was to be protected under Section 1 of the Amendment. *See, e.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 2765 (1866) (Sen. Howard).

Just as "the 5th and 14th Amendments of the American Constitution are an echo of the Magna Carta,"[15] so the ratification history of the Fourteenth Amendment shows that it was intended to extend that echo of freedom to African-Americans (and all citizens in the several States), putting them behind the aegis of Second Amendment protection, whether the threat to such rights was posed by federal or state incursion.

6. *Heller*'s logic and its careful survey of history will not permit the Second Amendment to be shunted to the side and relegated to second-class status in an arbitrary pecking order of constitutional rights. *Compare Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994) ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth

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[15] The full quotation is from a speech by Winston Churchill to the American Bar Association: "Last week you visited Runnymede. There was the foundation, on which you have placed a monument. It has often been pointed out that the 5th and 14th Amendments of the American Constitution are an echo of the Magna Carta . . . ." Winston Churchill, *Liberty and the Law* (given July 31, 1957), *in* 8 ROBERT RHODES JAMES, ed., WINSTON CHURCHILL: HIS COMPLETE SPEECHES: 1897-1963, 8682 (1974).

Amendment, should be relegated to the status of a poor relation in these comparable circumstances.").

With limited exception,[16] every other individual right enumerated in the first eight amendments contained in the Bill of Rights has been deemed incorporated against the States through the Fourteenth Amendment. There is simply no basis to deny the Second Amendment the same status. At the very least, there is every reason for this Court to decide that question now, whatever the answer.

7. Either or both of the pending petitions for certiorari on the Second Amendment incorporation issues arising out of *National Rifle Association* would be fitting for this Court to grant because those cases present the same Fourteenth Amendment issues concerning applicability of the Second Amendment to the States invoked in this petition. Indeed, consolidating those cases with this case and granting certiorari over all of them as a unit would put before the Court the fullest possible range of factual and legal settings in which to consider and resolve the burning issue of Second Amendment incorporation. *Compare, e.g., Granholm v. Heald*, 544 U.S. 460, 465 (2005); *Employment Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660, 663 n.4 (1988).

If one case must be selected, however, this case should be the main vehicle. The statute at issue in

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[16] *See, e.g., Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211 (1916) (jury trials in civil cases); *Hurtado v. California*, 110 U.S. 516 (1884) (requirement of indictment by grand jury); *Murphy v. Hunt*, 455 U.S. 478 (1982) (protection against excessive bail and fines).

this case, N.Y. Penal Law Section 265.01, bans possession of the prohibited categories of weapons, and nothing more.[17] Moreover, the Petitioner here, Mr. Maloney, challenges the statute merely to the extent it prohibits possession in the home, consistent with the tempest-in-a-teapot incident police inflicted upon him in 2000, surrounding his home for twelve hours on a false suspicion, and then charging him after a warrantless search with nunchaku possession.

Finally, the Court will remember that it granted certiorari over quite a limited question presented in *Heller*:

> Petition for a writ of certiorari . . . granted limited to the following question: Whether the following provisions [of the] D.C. Code . . . violate the Second Amendment rights of individuals who are not affiliated with any state-regulated militia, but who wish ***to keep*** handguns and other firearms for private use ***in their homes***?

District of Columbia v. Heller, 128 S. Ct. 645 (2007) (emphasis added). Hence, the question of the scope of the right to bear or carry weapons need not have

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[17] *Compare* Complaint, at ¶ 25 A, *in National Rifle Ass'n of Am., Inc. v. Village of Oak Park*, No. 08CV3696, (N.D. Ill. June 8, 2008) (assailing municipal code provision prohibiting carrying of handguns); Complaint, at ¶¶ 52-57, *in McDonald v. City of Chicago*, No. 1:08-cv-03645, (N.D. Ill. June 26, 2008) (challenging ordinance imposing registration requirements on certain firearms).

been addressed in that case (though the Court ultimately went on to analyze both parts of the double right to keep ***and*** bear arms). *Heller*, 128 S. Ct. at 2792-2797. Should the Court see the need to rewrite the question presented in a similar fashion again, the facts of this case are the best fit with the approach used in *Heller*, since the challenge in this case focused on incorporation of the Second Amendment right to ***keep arms, in the home***.

8. Finally, the fact that this case involves nunchaku and not firearms provides no reason to deny certiorari. First and foremost, none of the circuits involved in the split reached the question of whether the underlying arms were protected, so the issue is legally irrelevant. Mr. Maloney's amended complaint was dismissed before any such defense by Nassau County could be resolved. Second, *Heller* defined "arms" broadly as "any thing a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." 128 S. Ct. at 2791. Nunchaku readily meet that definition. Nunchaku are simply a form of the articulated club/baton — with a name unfamiliar to English ears. IAIN HOGG, THE ENCYCLOPEDIA OF WEAPONRY, 11 (2006).[18] Most importantly, the destructive power of all forms of blunt club-like weapons is far less than that of the handguns rightly held protected in *Heller*.

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[18] Indeed, every rifle can serve as a club in a pinch. The Bunker Hill patriots used them in just that way after running out of gunpowder during the third British assault. ALAN AXELROD, THE REAL HISTORY OF THE AMERICAN REVOLUTION: A NEW LOOK AT THE PAST, 134 (2007).

Claims about nunchaku to the contrary in the 1974 legislative history of New York Penal Law Section 265.01 are an overblown reaction to a popular martial-arts fantasy film. As they do with nunchaku, many American law enforcement organizations train and permit officers to carry an elongated stick with a handle attached perpendicularly thereto, akin to the Japanese weapon known as a "tonfa." CROMPTON at 62. Had actor Bruce Lee appeared in the 1973 movie *Enter the Dragon* wielding twin "tonfa," New York, fearful of emulation among the youth, could well have added that weapon to Section 265.01 instead of nunchaku.

II. THE COURT SHOULD ALSO GRANT CERTIORARI OVER THE QUESTION OF WHETHER THE PRIVILEGES OR IMMUNITIES CLAUSE OF THE FOURTEENTH AMENDMENT APPLIES THE SECOND AMENDMENT AGAINST THE STATES.

1. Both the text and the original understanding of the Fourteenth Amendment strongly support the conclusion that incorporation of the individual provisions of the Bill of Rights should proceed, if at all, through the Privileges or Immunities Clause. Nevertheless, the Court's decision in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), opened up lines of reasoning that ultimately gutted the Clause. *Slaughter-House* must eventually be overruled, if it cannot be reinterpreted. The former course of action is not difficult to sketch, for many academics have savaged *Slaughter-House* and argued that the Court should instead simply adopt a forceful interpretation

of the Clause straightaway.[19] The remainder of this petition therefore focuses on how the decision could be reinterpreted, leaving later decisions expanding *Slaughter-House* as the ones to be overruled.

2. Indeed, the reinterpretation of *Slaughter-House* offered below would retain the logical, textual, and historical understanding of the Clause while providing determinate limitations on its scope, thus avoiding the potentially open-ended nature of "substantive due process" doctrine which some members of this Court have questioned. *See, e.g., United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., concurring) ("If I thought that 'substantive due process' were a constitutional right rather than an oxymoron . . . .").

In order to secure the application of the Second Amendment to state actors specifically intended by the Fourteenth Amendment, this Court should grant review of the second question presented in this petition along with the first — or simply take review of a generic question presented rooted in no specific clause of the Fourteenth Amendment.

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[19] *Slaughter-House* has been subjected to withering criticism time and again. *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 22 (1980) ("Needless to say, there is not a bit of legislative history that supports the view that the Privileges or Immunities Clause was intended to be meaningless."); 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1302 (3d ed. 2000) ("But within a matter of years of the Fourteenth Amendment's adoption, the Supreme Court [in *Slaughter-House*] would squelch its framers' quite unmistakeable intentions while twisting the evident import of the text itself and all but remove the Privileges or Immunities Clause from the landscape of American constitutional law.").

A. The Original Understanding of the Privileges or Immunities Clause Shows It Was Designed to Apply the Personal Rights in the Bill of Rights Against the States.

1. The commentary surrounding the adoption of the Fourteenth Amendment confirms the most logical textual reading of the Privileges or Immunities Clause. The author of the Privileges or Immunities Clause, Congressman John Bingham, argued repeatedly that it was intended to overrule this Court's decision in *Barron v. Baltimore*, 32 U.S. 243 (1833), which held that the Bill of Rights applied exclusively to restrict the actions of the federal government (and which was the basis for *Cruikshank*, *Presser*, and *Miller*). *See, e.g.*, CONG. GLOBE, 39th Cong., 2d Sess. 811 (1867). Any conflict in the ratification era regarding the Privileges or Immunities Clause dealt not with whether the proposed Clause could be used to apply the ***Bill of Rights*** to the States, but instead concerned the extent to which the Clause's protections would cover ***unenumerated rights***.[20]

2. These observations are not new. Starting over

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[20] *Compare* CONG. GLOBE, 42nd Cong., 1st Sess. 84 app. (1871) (remarks by Rep. Bingham) ("[T]he privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States.") *with* CONG. GLOBE, 39th Cong., 1st Sess. 2765-66 (1866) (remarks by Senator Howard) (arguing that unlisted fundamental rights, such as those described in *Corfield v. Coryell*, 6 F. Cas. 546 (C.C.E.D. Pa. 1823), were also "privileges and immunities").

one hundred years ago, dissenting Justices of this Court articulated them in resistance to the Court's refusal to incorporate the Bill of Rights through the Privileges or Immunities Clause. *See, e.g., O'Neil v. Vermont*, 144 U.S. 323, 361-362 (1892) (Field, J., dissenting). What has changed since the last time this Court rejected an argument characterizing a freedom in the Bill as a "privilege or immunity" of United States citizenship is the Court's ultimate incorporation of nearly all the provisions of the first eight Amendments in the Bill of Rights through the Due Process Clause of the Fourteenth Amendment. Rejection of the Privileges or Immunities Clause as the basis for incorporation is no longer just a rejection of incorporation, it is a rejection of the most textually and historically accurate method of applying the Bill of Rights to the States.

B. *Slaughter-House* Itself Does Not Render the Privileges or Immunities Clause a Nullity.

1. The Court's main concern in *Slaughter-House* was situating within the existing structural constraints embodied in the Constitution a potentially capacious and judicially enforceable Privileges or Immunities provision (especially in its *Corfield v. Coryell* form). According to the Court, Congress could not have intended to "change the whole theory of the relations of the State and Federal governments," *Slaughter-House Cases,* 83 U.S. at 78, by putting in the federal government's control the protection of "nearly every civil right for the establishment and protection of which organized government is instituted." *Id.* at 76. To reconcile the Privileges or Immunities Clause with federalism, the Court thus declared two domains of individual

liberties — (i) those to be protected by the federal government as privileges or immunities of federal citizenship and (ii) those of state citizenship "which the State governments were created to establish and secure." *Id.* at 76. The challenge for the Court in *Slaughter-House* and subsequent decisions was to identify the line separating the two domains.

Defining the privileges of "citizens of the ***States***" was easy enough. According to the Court, these included all "fundamental" rights of individuals, including, for example, "the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety." *Id.* at 76 (citing *Corfield*, 6 F. Cas. at 551 (Justice Bushrod Washington riding circuit, interpreting the "privileges and immunities" clause of Article IV of the Constitution)). These must be within state control, reasoned the Court, for otherwise the Fourteenth Amendment would present "so great a departure from the structure and spirit of our institutions" that it could not have been intended by the body that proposed the amendments or the States that ratified them. *Id.* at 78.

2. The Court's fear is perhaps best understood when considered in the context of the claimed right at issue in the *Slaughter-House Cases*. There, the plaintiffs were aggrieved butchers who argued that interference with their economic right to practice their trade as a result of a New Orleans slaughterhouse regulation was an abridgement of their privileges or immunities under the Fourteenth Amendment. In that *Lochner*-like context, it is understandable that the Court was concerned with its corresponding role as "a perpetual censor upon all legislation of the States, on the civil rights of their

own citizens, with authority to nullify such as it did not approve as consistent with those rights . . . ." *Id.* at 78. *Compare Lochner v. New York*, 198 U.S. 45 (1905) (striking down statute restricting the working hours of bakers as trenching on the "freedom of contract").

The Court did, however, offer an exemplary list of privileges of federal as opposed to state citizenship. Of the listed rights, one set, including an individual's privilege "to demand the care and protection of the Federal government over his life, liberty, and property when on the high seas," owed their very existence to the establishment of the federal government. *Id.* at 79. To these the *Slaughter-House* Court added a second set of rights, including "the right to peaceably assemble and petition for redress of grievances, [and] the privilege of the writ of habeas corpus." *Id.* at 79. Unlike the first group of rights, the second group existed long before establishment of the federal government. The second set of rights also share the characteristic of being explicitly codified in the Constitution or the Bill of Rights. Thus, under *Slaughter-House*, a right that was preexisting or fundamental could be a privilege or immunity of federal citizenship if it was also enumerated in the federal Constitution.

C. Subsequent Decisions Concerning Incorporation of the Bill of Rights Provisions Under the Privileges or Immunities Clause Should Be Overruled to the Extent They Are Inconsistent with *Slaughter-House* Itself.

1. In *Slaughter-House*, facing a *Lochner*-like claim, the Court had no reason to address whether every one of the provisions of the Bill of Rights qualified as a privilege or immunity of national citizenship. Indeed, two such rights — the First Amendment rights to peaceably assemble and to petition for redress of grievances — were articulated nearly word-for-word by the *Slaughter-House* Court as examples of privileges of ***federal*** citizenship that States could not abridge. *Slaughter-House Cases*, 83 U.S. at 79.

2. But, follow-on decisions of the Court consistently relied on the case to refuse to characterize provisions of the Bill of Rights as privileges or immunities of United States citizens. These later decisions completely ignored the examples *Slaughter-House* gave of certain fundamental, enumerated rights as falling within the coverage of the Privileges or Immunities Clause, opting instead to limit the Clause's applicability to rights that existed only by virtue of the creation of the federal government, not rights that predated that event or were codified at the Founding. *Maxwell v. Dow*, 176 U.S. 581, 596 (1900).

Under this reasoning, (i) the Fifth Amendment's grand jury right, *id.*, and (ii) right to be free from self-incrimination, *Twining v. New Jersey*, 211 U.S. 78 (1908), (iii) the Sixth and Seventh Amendment's

jury trial rights, *Maxwell*, 176 U.S. at 596, *Walker v. Sauvinet*, 92 U.S. 90 (1875), and (iv) the Eighth Amendment's freedom from cruel and unusual punishment, *In re Kemmler*, 136 U.S. 436 (1890), were held ***not*** to be privileges or immunities of United States citizens. According to the Court in these various cases, these explicitly mentioned rights did not apply to state actors.

This restated rule, of course, would also exclude the right to habeas corpus and the right to peaceably assemble — rights that were preexisting in 1789 and later present in the Bill of Rights. Thus, these subsequent cases, although superficially relying on *Slaughter-House*, fumble the logic of the case, and to this extent unjustifiably narrow the Privileges or Immunities Clause. And it goes without saying that the purported federalism foundation for these cases has also been completely eroded, given the rise of selective incorporation doctrine and its application to most provisions of the Bill of Rights in the twentieth century and beyond.

3. Furthermore, sight should not be lost of the fact that the Bill of Rights provisions these cases distorting *Slaughter-House* refused to apply against the States track fairly closely the same rights that the modern Court has so far declined or refused to incorporate selectively under its current Fourteenth Amendment Due Process Clause jurisprudence. The holdings of these cases narrowing *Slaughter-House* thus might be harmonized with incorporation precedent on a view that the un-incorporated rights were more structural than personal, such that they did not count as a true "***privilege or immunity***." AKHIL REED AMAR, THE BILL OF RIGHTS 221 (1998) (proposing a "private right" "filter" for determining

whether a particular Bill of Rights provision counts as a "privilege or immunity" of federal citizenship).

D. The Right Protected by the Second Amendment Should Be Considered a Privilege or Immunity of Citizens of the United States.

The Second Amendment, unlike the other freedoms of the Bill of Rights, satisfies both aspects of the definition of "privileges or immunities of citizens of the United States" carved out in *Slaughter-House*. First, like the right to habeas corpus or the Petition Clause right, it could properly be considered a privilege or immunity of federal citizenship since it is a preexisting right that is explicitly codified in the ***United States Constitution***. Moreover, unlike the jury trial or other procedural rights considered by the Court in early Fourteenth Amendment cases, the right to keep and bear arms is plainly a substantive, personal right. "There seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms." *Heller*, 128 S. Ct. at 2799.

Second, the right protected by the Second Amendment also springs from the essential character of the federal government. As this Court recognized in *Heller*, "the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right — unlike some other English rights — was codified in a written Constitution." *Id.* at 2801. Without the right, the citizenry would have no power to protect itself against potential ***federal*** tyranny.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Counsel of Record
WILLIAM E. BESTANI
KATHARINE M. BURKE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
202-879-5000

Counsel for Petitioner
James M. Maloney

Of Counsel

James M. Maloney
33 Bayview Avenue
Port Washington, NY
11050
(516) 767-1395

APPENDIX

TABLE OF CONTENTS

Page

Opinion of the Court of Appeals (January 28, 2009) 1a

Order of the District Court on Motion for Reconsideration (May 14, 2007) 8a

Order of the District Court Dismissing Petitioner's Amended Complaint (January 17, 2007) 14a

Order of the District Court Denying Petitioner's Motion for Summary Judgment and Granting Petitioner Leave to File an Amended Complaint (August 31, 2005) 34a

Amended Complaint (September 3, 2005) 45a

Complaint (February 18, 2003) 61a

Letter from Benjamin Levine, Chairman, Committee on State Legislation, New York County Lawyers' Association to Hon. Malcolm Wilson, Governor of N.Y. (May 3, 1974) 72a

Report from Gregory J. Perrin, Chairman, Committee on the Criminal Court, New York County Lawyers' Association (April 29, 1974) 73a

Memorandum for the Governor from Louis J. Lefkowitz, Attorney General of N.Y. (April 8, 1974) 75a

Memorandum from Archibald R. Murray, N.Y. Executive Department, Division of Criminal Justice Services to Michael Whiteman (April 4, 1974) 77a

Letter from Richard C. Ross, Assemblyman 88th District to Michael Whiteman, Executive Chamber (April 2, 1974) 80a

Letter from B. Anthony Morosco, Legislative Secretary, District Attorneys Association to Hon. Michael Whiteman, Executive Chamber (April 1, 1974) 82a

Letter from Albert M. Rosenblatt, District Attorney of Dutchess County, N.Y. to Hon. Michael Whiteman, Executive Chamber (April 1, 1974) 83a

Pertinent Statutory Provision 84a

James M. MALONEY,

Plaintiff-Appellant,

v.

Andrew CUOMO, in his official capacity as Attorney General of the State of New York, David Paterson, in his official capacity as Governor of the State of New York, Kathleen A. Rice, in her official capacity as District Attorney of the County of Nassau, and their successors,*

Defendants-Appellees.

Docket No. 07-0581-cv.

United States Court of Appeals,
Second Circuit

Argued: Dec. 15, 2008

Decided: Jan. 28, 2009

James M. Maloney, appearing pro se, for Plaintiff-Appellant.

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(2), Governor David Paterson is automatically substituted for former Governor Eliot Spitzer as a defendant in this case.

Karen Hutson, Deputy County Attorney (Lorna B. Goodman, County Attorney, on the brief) for Defendant-Appellee, Kathleen A. Rice, Nassau County District Attorney, Mineola, N.Y.

Before: POOLER, SOTOMAYOR, and KATZMANN, Circuit Judges.

PER CURIAM:

Plaintiff-appellant James Maloney was arrested at his home on August 24, 2000, and charged with possessing a chuka stick in violation of N.Y. Penal Law § 265.01(1). A "chuka stick" (or "nunchaku") is defined as

> any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking.

Id. § 265.00(14).[1] This charge was dismissed on January 28, 2003, and Appellant pleaded guilty to one count of disorderly conduct. As part of the plea, he agreed to the destruction of the nunchaku seized from his home.

Appellant filed the initial complaint in this action on February 18, '2003, and then an amended

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[1] There are two sections of the New York Penal Law numbered 265.00(14).

complaint on September 3, 2005, seeking a declaration that N.Y. Penal Law §§ 265.00 through 265.02 are unconstitutional insofar as they punish possession of nunchakus in one's home. The district court dismissed the amended complaint as against the New York State Attorney General and the Governor for lack of standing, concluding that neither official is responsible for enforcing the statutes at issue. The district court granted defendant Nassau County District Attorney Kathleen Rice's motion for judgment on the pleadings in relevant part because the Second Amendment does not apply to the States and therefore imposed no limitations on New York's ability to prohibit the possession of nunchakus. Appellant moved for reconsideration on the ground that the district court had failed to consider certain other claims raised in his amended complaint; the district court denied that motion.

On appeal, Appellant challenges only the district court's dismissal of his claims against Rice.[2] He argues, *inter alia*, that New York's statutory ban on the possession of nunchakus violates (1) the Second Amendment because it infringes on his right to keep and bear arms, and (2) the Fourteenth Amendment

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[2] Appellant makes no argument in his brief concerning the district court's dismissal of his claims against the Attorney General and the Governor. We therefore deem any challenges to that aspect of the district court's judgment waived. *See Yueqing Zhang v. Gonzales*, 426 F.3d 540, 541 n. 1 (2d Cir.2005).

because it lacks a rational basis. Neither of these arguments has any merit.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court recently held that this confers an individual right on citizens to keep and bear arms. *See District of Columbia v. Heller*, --- U.S. ---, 128 S.Ct. 2783, 2799, 171 L.Ed.2d 637 (2008). It is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose on this right. *See, e.g., Presser v. Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 29 L.Ed. 615 (1886) (stating that the Second Amendment "is a limitation only upon the power of congress and the national government, and not upon that of the state"); *Bach v. Pataki*, 408 F.3d 75, 84, 86 (2d Cir.2005) (holding "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts" and noting that this outcome was compelled by *Presser*), *cert. denied*, 546 U.S. 1174, 126 S.Ct. 1341, 164 L.Ed.2d 56 (2006). *Heller*, a case involving a challenge to the District of Columbia's general prohibition on handguns, does not invalidate this longstanding principle. *See Heller*, 128 S.Ct. at 2813 n. 23, 128 S.Ct. 2783 (noting that the case did not present the question of whether the Second Amendment applies to the states). And to the extent that *Heller* might be read to question the continuing validity of this principle, we "must follow *Presser*" because "[w]here, as here, a Supreme Court precedent 'has direct application in a case, yet appears to rest on reasons

rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to the Supreme Court the prerogative of overruling its own decisions.'" *Bach*, 408 F.3d at 86 (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989)) (alteration marks omitted); *see also State Oil Co. v. Khan*, 522 U.S. 3, 20, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997). Thus, N.Y. Penal Law §§ 265.00 through 265.02 do not violate the Second Amendment.

The Fourteenth Amendment similarly provides no relief for Appellant. "Legislative acts that do not interfere with fundamental rights or single out suspect classifications carry with them a strong presumption of constitutionality and must be upheld if 'rationally related to a legitimate state interest.'" *Beatie v. City of New York*, 123 F.3d 707, 711 (2d Cir.1997) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985)). We will uphold legislation if we can identify "some reasonably conceivable state of facts that could provide a rational basis for the legislative action. In other words, to escape invalidation by being declared irrational, the legislation under scrutiny merely must find some footing in the realities of the subject addressed by the law." *Id.* at 712 (internal quotation marks and citations omitted).

The legislative history of section 265.00 makes plain that the ban on possession of nunchakus imposed by section 265.01(1) is supported by a rational basis. Indeed, as Appellant concedes, when the statute was under consideration, various parties

submitted statements noting the highly dangerous nature of nunchakus. For example, New York's Attorney General, Louis J. Lefkowitz, asserted that nunchakus "ha[ve] apparently been widely used by muggers and street gangs and ha[ve] been the cause of many serious injuries." Mem. from Attorney Gen. Louis J. Lefkowitz to the Governor (Apr. 8, 1974). And the sponsor of the bill, Richard Ross, stated that "[w]ith a minimum amount of practice, [the nunchaku] may be effectively used as a garrote, bludgeon, thrusting or striking device. The [nunchaku] is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill." *See* N.Y. Penal Law § 265.00, practice commentary, definitions ("Chuka stick") (quoting Letter of Assemblyman Richard C. Ross to the Counsel to the Governor (1974)).

Appellant does not dispute that nunchakus can be highly dangerous weapons. Rather, his principal argument is that section 265.01(1) prevents martial artists from using nunchakus as part of a training program. But the fact that nunchakus might be used as part of a martial-arts training program cannot alter our analysis. Where, as here, a statute neither interferes with a fundamental right nor singles out a suspect classification, "we will invalidate [that statute] on substantive due process grounds only when a plaintiff can demonstrate that there is no rational relationship between the legislation and a legitimate legislative purpose." *Beatie*, 123 F.3d at 711. Appellant has not carried this burden. Consequently, in light of the legislature's view of the danger posed by nunchakus, we find that the prohibition against the possession of

nunchakus created by N.Y. Penal Law § 265.01(1) is supported by a rational basis.

We have considered Appellant's remaining arguments and find them to be without merit. Accordingly, for the foregoing reasons, the judgment of the district court is hereby **AFFIRMED**. Appellant's pending motions to strike defendant Kathleen Rice's brief and material in her July 28, 2008 Rule 28(j) letter are hereby **DENIED**.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiffs,

- against -

ANDREW CUOMO, in his official capacity as Attorney General of the State of New York, ELIOT SPITZER, in his official capacity as Governor of the State of New York, KATHLEEN A. RICE, in her official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

ORDER

---

03 CV 0786 (ADS) (MLO)

APPEARANCES:

JAMES M. MALONEY
Plaintiff *Pro Se*
33 Bayview Avenue
Port Washington, New York 11050

ANDREW CUOMO
STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL
Attorneys for the State Defendants
200 Old County Road, Suite 460
Mineola, New York 11545-1403
By: Assistant Attorney General, Dorothy O. Nese

LORNA B. GOODMAN
NASSAU COUNTY ATTORNEY'S OFFICE
Attorney for the District Attorney
One West Street
Mineola, New York 11051
By: Deputy County Attorney, Liora M. Ben-Sorek
Deputy County Attorney Tatum J. Fox

SPATT, District J.

In this action, James M. Maloney alleges that New York State's prohibition of the possession of "nunchaku," a hand-held weapon comprised of two short sticks of equal length joined by a rope or a chain, also referred to as "chuka sticks" or "nun-chuks," violates the United States Constitution. On January 17, 2007, the Court granted the State Defendants' motion to dismiss the amended complaint, and granted the District Attorney's motion for judgment on the pleadings. The amended complaint was dismissed against all defendants. Presently before the Court is the plaintiff's motion for reconsideration of the Memorandum of Decision and Order, dated January 17, 2007, pursuant to Local Rule 6.3.

Pursuant to Local Rule 6.3, a party may request reconsideration if counsel believes that there are "matters or controlling decisions" that the Court overlooked. Local Rule 6.3; *see also Hertzner v. Henderson*, 292 F.3d 302, 303 (2d Cir. 2002); *Yurman Design Inc. v. Shieler Trading Corp.*, No. 99 Civ. 9307, 2003 WL 22047849, at *1 (S.D.N.Y. Aug. 28, 2003). "A motion for reconsideration should be granted only where the moving party demonstrates that the Court has overlooked factual matters or controlling precedent that were presented to it on the underlying motion and that would have changed its decision." *In re Worldcom, Inc. Sec. Litig.*, 308 F. Supp. 2d 214, 224 (S.D.N.Y. 2004); *Colodney v. Continuum Health Partners, Inc.*, No. 03-7276, 2004 WL 1857568, at *1 (S.D.N.Y. Aug. 18, 2004); *see also In Re BDC 56 LLC*, 330 F.3d 111, 123 (2d Cir. 2003).

A motion for reconsideration is "narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been considered fully by the Court." *Dellefave v. Access Temps., Inc.*, No. 99 Civ. 6098, 2001 WL 286771, at *1, 2001 U.S. Dist. LEXIS 3165, at *1 (S.D.N.Y. Mar. 22, 2001); *see also Shrader v. CSX Transp. Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (stating that reconsideration "should not be granted where the moving party seeks solely to re-litigate an issue already decided"); *In re Houbigant, Inc.*, 914 F. Supp. 997, 1001 (S.D.N.Y.1996) (stating that a Rule 6.3 motion is "not a motion to reargue those issues already considered when a party does not like the way the original motion was resolved").

The plaintiff argues that the Court overlooked the part of the amended complaint alleging that New

York's criminalization of the in-home possession of nunchaku violate (1) "those rights recognized under the doctrine [of] substantive due process"; (2) "those rights recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003)"; (3) "those rights guaranteed by the Fourteenth Amendment"; and (4) "those rights the existence of which may be drawn inferentially ("penumbras and emanations") from a reading of the first eight amendments to the Constitution of the United States and/or the Declaration of Independence."

Here, the plaintiff failed to meet the high burden required for reconsideration. The right to privacy, whether as defined under the doctrine of substantive due process; as discussed in *Lawrence*; as guaranteed by the Fourteenth Amendment; or as drawn inferentially from the first eight amendments to the Constitution, does not provide the plaintiff with a constitutional right to possess nunchuku within his home. *See Bowers v. Hardwick*, 478 U.S. 186, 195, 106 S. Ct. 2841, 2846, 92 L. Ed. 2d 140 (1986) ("[O]therwise illegal conduct is not always immunized whenever it occurs in the home."), *overruled on other grounds by Lawrence*, 539 U.S. at 578, 123 S. Ct. at 2484; *Stanley v. Georgia*, 394 U.S. 557, 568 n.11, 89 S. Ct. 1243, 1250 n.11, 22 L. Ed. 2d 542 (1969) (invalidating a State's attempt to make mere private possession of obscene material a crime, but stating that the ruling "in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime."); *Scope, Inc. v. Pataki*, 386 F. Supp. 2d 184, 193-94 (W.D.N.Y. 2005) (rejecting privacy challenge to the constitutionality

of a New York State statute pertaining to the sale of guns and the creation of database for guns sold in the state); *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 746 F. Supp. 1415, 1419-20 (E.D.Cal. 1990) (noting that the right to privacy has "never been extended to the private citizen [a] right to possess weapons"; rejecting privacy challenge to the validity of California statutes regulating the manufacture and transfer of assault weapons); *cf. Crowley Cutlery Co. v. United States*, 849 F.2d 273, 278 (7th Cir. 1988) ("Switchblade knives are dangerous, and the due process clause [of the Fifth Amendment] does not forbid the banning of dangerous products."); *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Bell*, 488 F. Supp. 123, 132-33 (D.D.C. 1980) (rejecting the argument that the right of privacy in general and privacy in the home forbids any governmental ban on private possession and use of marijuana).

Furthermore, the plaintiff's reliance on *Lawrence v. Texas*, 539 U.S. 558, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), is misplaced. The question before the Court in *Lawrence* was whether the State of Texas could make it a crime for two persons of the same sex to engage in certain intimate sexual conduct. 539 U.S. at 562, 123 S. Ct. at 2475. The Court held the statute to be unconstitutional, ruling that the substantive aspect of the due process clause protected the right of individuals of the same sex to engage in private, consensual, intimate sexual relations. That case is not controlling here.

Based on the foregoing, it is hereby

ORDERED, that the plaintiff's motion for reconsideration of the Court's January 17, 2007 Memorandum of Decision and Order is denied.

SO ORDERED.

Dated: Central Islip, New York
May 14, 2007

/s/ Arthur D. Spatt

ARTHUR D. SPATT
United States District Judge

James M. MALONEY,

Plaintiffs,

v.

Andrew CUOMO, in his official capacity as Attorney General of the State of New York, Eliot Spitzer, in his official capacity as Governor of the State of New York, and Kathleen A. Rice, in her official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

No. 03 CV 0786(ADS)(MLO)

United States District Court,

E.D. New York

January 17, 2007

James M. Maloney, Port Washington NY, Plaintiff Pro Se.

Andrew Cuomo, State of New York, Office of the Attorney General, by Dorothy O. Nese, Assistant Attorney General, Mineola, NY, for the State Defendants.

Lorna B. Goodman, Nassau County Attorney's Office, by Liora M. Ben-Sorek, Deputy County Attorney, Tatum J. Fox, Deputy County Attorney, Mineola, NY, for the District Attorney.

MEMORANDUM OF DECISION AND ORDER

SPATT, District Judge.

James M. Maloney, a licensed attorney acting *pro se*, brought this action against New York State Attorney General Eliot Spitzer, New York State Governor George Pataki (together with Spitzer, the "State Defendants"), and Nassau County District Attorney Dennis Dillon (collectively, the "Defendants"), seeking a declaration that certain provisions of the New York State Penal Law that prohibit the in-home possession of "nunchaku" are unconstitutional.

Presently there are two motions before the Court: (1) a motion by the State Defendants to dismiss the amended complaint for (a) lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure ("Fed. R. Civ. P."); and (b) failure to state a claim pursuant to Fed.R.Civ.P. 12(b)(6); and (2) a motion by the District Attorney to dismiss the complaint for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c).

I. BACKGROUND

The following facts are taken from the amended complaint. The plaintiff was born in 1959, making him forty-four years old at the time of the commencement of this action. The plaintiff has been a student of martial arts since approximately 1975.

The plaintiff practices several martial arts disciplines, including "Okinawan" styles of karate, "Ving Tsun" or "Wing Chun" style of kung fu, and aikido. Drawing on the various forms of martial arts, the plaintiff developed his own style called "Shafan Ha-Lavan."

The plaintiff's "Shafan Ha-Lavan" martial art incorporates the use of "nunchaku" as a part of the training and technique. "Nunchaku," also referred to as "chuka sticks" or "nun-chuks," is a hand-held weapon, commonly described as being devised of two short sticks of equal length joined by a rope or a chain. The New York criminal statute at issue in this case defines "nunchaku" as follows:

> Chuka stick means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

N.Y. Penal Law § 265.00(14). The plaintiff alleges that he has trained peacefully with the nunchaku since 1975, and has acquired numerous nunchaku during his training. The plaintiff alleges that he only uses the nunchaku within the context of his martial arts training.

On August 24, 2000, the plaintiff was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree for

possessing a nunchaku in his home in violation of New York Penal Law § 265.01. This section states, in part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star."

N.Y. Penal Law § 265.01(1). A violation of section 265.01 is a class A misdemeanor.

The criminal charges for possession of nunchaku was based solely on in-home possession, and not supported by any allegations that the plaintiff had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku. Thus, the only criminal activity alleged against the plaintiff was his possession of the nunchaku in his home.

On January 28, 2003, the criminal charges against the plaintiff were dismissed. Although the plaintiff does not indicate the reason the charges were dismissed in the amended complaint, the Court is cognizant from the earlier proceedings in this Court that the criminal possession charges were dismissed in exchange for the plaintiff's guilty plea to one count of disorderly conduct pursuant to New York Penal Law § 240.20(7). The plaintiff received a conditional discharge with regard to the other

pending charges; agreed to the destruction of the nunchaku confiscated at the time of his August 24, 2000 arrest; and paid a fine in the amount of $310.

On February 18, 2003, the plaintiff commenced this action by filing this complaint against the Attorney General and the District Attorney seeking a declaration that sections 265.00 through 265.02 of the New York Penal Law are unconstitutional. Although the plaintiff was charged with violating section 265.01, he is also challenging the constitutionality of section 265.02. Section 265.02 provides that a violation of section 265.01 by a person who has previously been convicted of any crime is a class D felony, rather than a misdemeanor. On April 15, 2003, the plaintiff voluntarily dismissed his cause of action against the District Attorney pursuant to Fed.R.Civ.P. 41(a)(1)(ii), without prejudice. On October 31, 2004, the plaintiff filed a motion for summary judgment against the Attorney General.

On August 31, 2005, the Court issued a Memorandum of Decision and Order denying the plaintiff's motion for summary judgment. The Court held that the plaintiff lacked standing to prosecute this action against the Attorney General. Specifically, the Court stated:

> In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, "the proper defendants are the government officials charged with the administration and enforcement of the statute." *Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.) (citing *New*

> *Hampshire Right to Life Comm. v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996) (citations omitted)). "It is well established in New York that the district attorney, *and the district attorney alone*, should decide when and in what manner to prosecute a suspected offender." *Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir.1988) (citations omitted).

Memorandum of Decision and Order, at 8 (emphasis added). Accordingly, the Court concluded that the plaintiff lacked standing under Article III, section 2 of the Constitution and the Declaratory Judgment Act, 28 U.S.C. § 2201. However, the Court *sua sponte* granted the plaintiff leave to serve a supplemental summons and amended complaint "against the entity responsible for the potential prosecution of the plaintiff under the statutes in question."

On September 3, 2005, the plaintiff filed an amended complaint naming the Attorney General, the Governor, and the District Attorney as defendants. The plaintiff challenges the constitutionality of New York's ban on the in-home possession of nunchaku.

II. DISCUSSION

A. As to The Caption

Rule 25(d) provides that "[w]hen a public officer is party to an action in his official capacity and during its pendency . . . ceases to hold office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party." Fed.R.Civ.P. 25(d).

Originally, the amended complaint named former Attorney General Elliot Spitzer, former Governor George Pataki, and former District Attorney Dennis Dillon as defendants. Since the time that the amended complaint was filed, Andrew Cuomo succeeded Eliot Spitzer as Attorney General, Eliot Spitzer replaced George Pataki as Governor, and Kathleen A. Rice succeeded Denis Dillon as the Nassau County District Attorney. Accordingly, the caption on this Memorandum of Decision and Order reflects those substitutions.

B. The Plaintiff's *Pro Se* Status

Although the plaintiff is proceeding *pro se*, he is an attorney duly licensed to practice law in the State of New York, the Second Circuit Court of Appeals, and the United States District Court for the Southern and Eastern Districts of New York. The plaintiff's letterhead, which appears on documents he has submitted in this case, states that he is an "attorney at law" and a "proctor in admiralty." In addition to being admitted to practice in the State and federal courts of New York, the plaintiff's letterhead also indicates that he is admitted in New Jersey, the United States Supreme Court, the United States Courts of Appeal for the Second and Third Circuits, the District of New Jersey, the District of Connecticut, the Northern District of Illinois, the Court of International Trade, and the Court of Federal Claims.

Although the Court normally will hold the pleadings of a *pro se* plaintiff to a less rigorous standard of review than pleadings drafted by counsel, as an experienced attorney the plaintiff's

papers in this case are not entitled to such special consideration. *See Goel v. U.S. Dept. of Justice*, No. 03cv0579, 2003 WL 22047877, *1 (S.D.N.Y. Aug.29, 2003); *Kuriakose v. City of Mount Vernon*, 41 F.Supp.2d 460, 465 (S.D.N.Y.1999); *Guardino v. Am. Sav. & Loan Ass'n of Fla.*, 593 F.Supp. 691, 694 (E.D.N.Y.1984).

C. The Declaratory Judgment Act

Although not raised by the parties, the Court must, as an initial matter, determine whether jurisdiction in this Court is proper. The plaintiff seeks relief under the Declaratory Judgment Act, 28 U.S.C. § 2201. This Act does not itself provide a basis for jurisdiction. *See* 28 U.S.C. § 2201(a) ("In a case of actual controversy *within its jurisdiction* . . . any court of the United States . . . may declare the rights and other legal relations of any interested party.") (emphasis added); *Conn. Yankee Atomic Power Co. v. Town of Haddam Planning and Zoning Comm'n*, 19 Fed. Appx. 21, 22-23, 2001 WL 1167816 *1 (2d Cir.2001). Thus, for jurisdiction to lie, the matter to be determined must satisfy the case or controversy requirement for federal jurisdiction pronounced in Article III, Section 2 of the United States Constitution. *Id.* (citing *Niagara Mohawk Power Corp. v. Tonawanda Band of Seneca Indians*, 94 F.3d 747, 752 (2d Cir.1996)).

A declaratory judgment action presents an actual controversy if "the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Duane Reade, Inc. v. St. Paul Fire and Marine Ins. Co., 411 F.3d 384, 388 (2d Cir.2005); *In re Prudential Lines Inc.*, 158 F.3d 65, 70 (2d Cir.1998) (quoting *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941)). A plaintiff seeking declaratory relief cannot rely solely on past injury to satisfy this requirement, but must show a likelihood that the challenged conduct will occur again in the future. *McCormick v. School Dist. of Mamaroneck*, 370 F.3d 275, 284 (2d Cir.2004); *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir.1998).

In this case, the Declaratory Judgment Act is satisfied because the plaintiff has already been arrested once under the allegedly unconstitutional statute, and intends to continue using nunchaku in his martial arts training, which he considers to be constitutionally protected activity. *See Steffel v. Thompson*, 415 U.S. 452, 462, 94 S.Ct. 1209, 1217, 39 L.Ed.2d 505 (1974) (Brennan, J.) (discussing the desire to avoid putting a plaintiff to the choice of "intentionally flouting state law" or "forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding.").

D. Motion to Dismiss Standards

1. Rule 12(b)(1)

When considering a motion to dismiss for lack of subject matter jurisdiction under Fed.R.Civ.P. 12(b)(1), the Court may consider affidavits and other materials beyond the pleadings to resolve jurisdictional questions. *Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140 n. 6 (2d Cir.2001).

Under Rule 12(b)(1), the Court must accept as true all material factual allegations in the complaint, but will not draw inferences favorable to the party asserting jurisdiction. *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir.1998).

2. Rule 12(b)(6)

Fed.R.Civ.P. 12(b)(6) allows a court to dismiss a complaint for "failure to state a claim on which relief can be granted." In deciding such a motion, the Court must take the allegations of the complaint to be true and "draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt*, 79 F.3d 318, 321 (2d Cir.1996). In this regard, a complaint will not be dismissed unless "'it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief.'" *Scutti Enters., LLC. v. Park Place Entm't Corp.*, 322 F.3d 211, 214 (2d Cir.2003) (quoting *Jaghory v. N.Y. State Dep't of Educ.*, 131 F.3d 326, 329 (2d Cir.1997)); *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198, 202 (2d Cir.1999).

3. Rule 12(c)

The standard for reviewing a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is analogous to the rules pursuant to Rule 12(b)(6). *Patel v. Contemporary Classics of Beverly Hills*, 259 F.3d 123, 126 (2d Cir.2001). The Court must determine whether "the moving party is entitled to judgment as a matter of law." *Burns Int'l Sec. Servs., Inc. v. Int'l Union United Plant Guard Workers of Am.*, 47 F.3d 14, 16 (2d Cir.1995). As with a 12(b)(6) motion to dismiss, the issue is not whether the plaintiff will ultimately prevail but

whether the plaintiff is entitled to offer evidence to support the claims. *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir.1995).

E. The Attorney General and the Governor are not Proper Defendants

The Court previously held in this case that the plaintiff lacks standing to sue the Attorney General because the plaintiff has no reasonable fear of prosecution by this official. *See Maloney v. Spitzer*, 03cv0786, Memorandum of Decision and Order (Aug. 31, 2005); *accord Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (N.D.N.Y. Oct. 1, 1997) (dismissing claims against Governor for failure to state a claim because Governor had no responsibility for administering or enforcing the challenged statute) (citation omitted); *cf. Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir.1988) ("It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender.").

Notwithstanding the Court's August 31, 2005 Order, the plaintiff argues that the Attorney General is a proper defendant because the amended complaint "seeks contingent equitable relief, . . . in a form such as an affirmative injunction requiring the Attorney General to notify any persons who received notice that their home possession of nunchaku is illegal . . . that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes." Pls. Br. at 20. The Court does not agree that this request for "contingent" relief creates standing on the part of the plaintiff against the

Attorney General. Accordingly, the plaintiff's claims against the Attorney General are dismissed.

Similarly, the Court sees no basis for the plaintiff to assert his claims against the Governor. As with the Attorney General, the Governor is not involved in the enforcement of the statutes that the plaintiff is challenging. Thus, the claims against the Governor should be dismissed. *See Wang v. Pataki*, 164 F.Supp.2d 406, 410 (S.D.N.Y.2001) (dismissing Governor as a defendant in a suit raising a challenge to the constitutionality of a state statute where there were no allegations that the Governor had any connection with the enforcement of the statute "other than the general duty to take care that the laws be faithfully executed"); *see also Romeu v. Cohen*, 121 F.Supp.2d 264, 272 (S.D.N.Y.2000); *Warden v. Pataki*, 35 F.Supp.2d 354, 359 (S.D.N.Y.) (citations omitted), aff'd, 201 F.3d 430, 1999 WL 1012404 (2d Cir.1999); *cf. Shell Oil Co. v. Noel*, 608 F.2d 208, 211-12 (1st Cir.1979) ("The mere fact that a governor is under a general duty to enforce state laws does not make him a proper party defendant in every action attacking the constitutionality of a state statute. Nor is the mere fact that an attorney general has a duty to prosecute all actions in which the state is interested enough to make him a proper defendant in every such action.") (citations omitted). Accordingly, the State Defendants' motion to dismiss the complaint is granted.

F. As to the District Attorney's Motion for Judgment on the Pleadings

Having dismissed the plaintiff's complaint against the State Defendants, the only defendant

that remains is the District Attorney. The plaintiff's amended complaint challenges the constitutionality of New York's weapons-possession law, as applied to the in-home possession of nunchaku by the plaintiff, on three independent grounds: (1) the free speech clause of the First Amendment; (2) the Second Amendment's right to bear arms; and (3) "unenumerated" rights found in the Ninth Amendment. The District Attorney argues that she is entitled to judgment on the pleadings on all three causes of action.

1. As to the First Amendment

The first amendment provides, in part, that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. This provision protects not only actual speech, but also "expressive" or "symbolic" conduct. *See Virginia v. Black*, 538 U.S. 343, 358, 123 S.Ct. 1536, 1547, 155 L.Ed.2d 535 (2003); *Spence v. Washington*, 418 U.S. 405, 409, 94 S.Ct. 2727, 41 L.Ed.2d 842 (1974); *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). However, the First Amendment does not protect all conduct that a person intends to be expressive or symbolic. *O'Brien*, 391 U.S. at 376, 88 S.Ct. at 1678. Whether particular conduct is worthy of First Amendment protection depends on whether the actor intended "to convey a particularized message," and whether the surrounding circumstances are such that "the likelihood was great that the message would be understood by those who viewed it." *Spence*, 418 U.S. at 410-11, 94 S.Ct. at 2730.

In this case, the plaintiff alleges that the "peaceful training with and twirling of the nunchaku [in the privacy of one's own home] is expressive conduct, which is protected by the First Amendment to the Constitution of the United States." (Am. Compl.¶¶ 40, 46.) In her motion for judgment on the pleadings, the District Attorney does not make a genuine effort do dispute the plaintiff's contention that his use of the nunchaku constitutes protected speech. Instead, citing religious-exercise cases, the District Attorney argues that New York State's blanket ban on the possession of nunchaku is a reasonable restriction on the plaintiff's expression, and necessary to satisfy a legitimate government objective. *See People v. Singh*, 135 Misc.2d 701, 516 N.Y.S.2d 412 (1987) (holding that a New York law prohibiting, with some exceptions, the wearing or carrying of knives did not violate a Sikh's freedom to practice his religion, which required him to carry a sword called a "Kirpan"); *see also United States v. Lee*, 455 U.S. 252, 261, 102 S.Ct. 1051, 1057, 71 L.Ed.2d 127 (1982) (holding that the collection of social security taxes did not violate the First Amendment free exercise rights of an employer who was a member of the Old Order Amish). Notwithstanding the District Attorney's failure to challenge the plaintiff regarding the nature of his alleged "speech," it is the opinion of the Court that the plaintiff's conduct in this case is not speech, and therefore the plaintiff fails to state a claim under the First Amendment.

To be clear, the plaintiff does not allege that he has or will try to convey any "particularized" message through his use of the nunchaku. *See*

Spence, 418 U.S. at 410-11, 94 S.Ct. at 2730. The plaintiff uses the nunchaku "to develop dexterity and coordination." (Compl.¶ 16.) The plaintiff began training with the weapon, based in part, on its effectiveness in disarming an assailant armed with a knife or other sharp instrument. (Compl.¶ 17). There are no allegations that the use of the nunchaku are integral to anything resembling either actual or symbolic speech.

The Supreme Court has held that the First Amendment protects a wide variety of conduct, including many forms of entertainment. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag burning); *Spence*, 418 U.S. 405, 94 S.Ct. 2727 (affixing a peace symbol to a flag); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (marching); *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) (wearing armbands); *see also, e.g., Schad v. Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981) ("Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee"); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569, 115 S.Ct. 2338, 2345, 132 L.Ed.2d 487 (1995) (remarking that examples of painting, music, and poetry are "unquestionably shielded").

However, lower federal courts and state courts have generally been unwilling to extend First Amendment protection to sports or athletics. *See*

Justice v. Nat'l Collegiate Athletic Assoc., 577 F.Supp. 356, 374 (D.Ariz.1983) ("[P]laintiff's argument that the players have been denied a constitutional right to expression through football is unfounded"); *MacDonald v. Newsome*, 437 F.Supp. 796, 798 (E.D.N.C.1977) (holding that surfing is not protected under the First Amendment); *Murdock v. City of Jacksonville*, 361 F.Supp. 1083, 1095-96 (M.D.Fla.1973) (holding that wrestling is not "pure" speech, free speech, "akin to free speech," or a symbolic act protected by the Constitution); *Top Rank, Inc. v. Fla. State Boxing Comm'n*, 837 So.2d 496, 498 (Fla.Dist.Ct.App.2003) ("[T]he act of boxing does not involve either pure or symbolic speech.") (citation omitted); *Sunset Amusement Co. v. Board of Police Comm'rs of Los Angeles*, 7 Cal.3d 64, 101 Cal.Rptr. 768, 496 P.2d 840, 845-46 (1972) (ruling that roller-skating is not a constitutionally protected activity and stating that "no case has ever held or suggested that simple physical activity falls within the ambit of the First Amendment, at least in the absence of some element of communicating or advancing ideas or beliefs."). *But cf. Post Newsweek Stations-Connecticut v. Travelers Ins. Co.*, 510 F.Supp. 81, 86 (D.Conn.1981) (stating that entertainment in the form of the exposition of an athletic exercise, in this case world-class figure skating, "is on the periphery of protected speech").

As the Court stated in *Justice*: "In its most basic form, athletic competition does not constitute pure speech; rather, participation in athletic competition constitutes physical activity or conduct." *Justice*, 577 F.Supp. at 374. Although the activity in this case is not competition, the Court sees no reason to

distinguish between public competition and at home training or practice for purposes of the First Amendment.

The Court recognizes and accepts that the martial arts generally, and perhaps use of nunchaku in particular, have a rich history and are culturally significant to many people in many parts of the world. Under some circumstances an individual's participation in martial arts, and the attendant use of related equipment such as nunchaku, might warrant some degree of First Amendment protection. But there is nothing in the amended complaint or the plaintiff's papers to suggest that should be the case here. The plaintiff alleges that he uses the nunchaku for physical training and for self-defense. Under these circumstances, it is the opinion of the Court that the plaintiff is similar to the boxer and wrestler engaged in a strictly physical and unprotected activity. As such, the amended complaint on its face fails to satisfy the first requirement of the *Spence* test. Accordingly, the District Attorney's Rule 12(c) motion to dismiss the plaintiff's first cause of action is granted.

2. As to the Second and Ninth Amendments

The plaintiff's remaining causes of action alleging violations of the Second and Ninth Amendments are easily disposed of. The Second Amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. With regard to the plaintiff's claim that New York's ban on possessing nunchaku violates the Second Amendment, the Court looks to

the Second Circuit's decision in *Bach v. Pataki*, 408 F.3d 75 (2d Cir.2005). The plaintiff in *Bach*, a non-resident of the State of New York, challenged a New York statute that restricts the issuance of handgun licenses to only New York residents. In rejecting the plaintiff's Second Amendment challenge, the Court held "that the Second Amendment's 'right to keep and bear arms' imposes a limitation on only federal, not state, legislative efforts." *Id.* at 84. *Bach* is controlling here. The Second Amendment imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku. Accordingly, the District Attorney's motion to dismiss the plaintiff's second cause of action is granted.

The Ninth Amendment provides that "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. II. Similar to the Second Amendment, the Ninth Amendment is only applicable against federal, and not state, actors. *See Rini v. Zwirn*, 886 F.Supp. 270, 289-90 (E.D.N.Y.1995) (citing Laurence H. Tribe, American Constitutional Law § 11-2, at 772-73 (2d ed.1988)). In addition, the Ninth Amendment is considered "a rule of construction" that does not give rise to individual rights. *See United States v. Bifield*, 702 F.2d 342, 349 (2d Cir.1983); *see also Clynch v. Chapman*, 285 F.Supp.2d 213, 219 (D.Conn.2003) (dismissing Ninth Amendment cause of action for failure to state a claim); *Rini*, 886 F.Supp. at 289-90 (dismissing Section 1983 cause of action based on a violation of the Ninth Amendment). So while the Ninth Amendment may

provide the basis for recognition of un-enumerated rights, which themselves may be enforceable against a State under the Due Process Clause of the Fourteenth Amendment, the Ninth Amendment itself provides no substantive right. *See Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir.1991) (dismissing the plaintiff's Ninth Amendment claim on the ground that "the ninth amendment does not confer substantive rights in addition to those conferred by other portions of our governing law"); *DeLeon v. Little*, 981 F.Supp. 728, 734 (D.Conn.1997) (holding that "'the [Ninth Amendment] does not guarantee any constitutional right.'" (quotation omitted)); *Mann v. Meachem*, 929 F.Supp. 622, 634 (N.D.N.Y.1996) (dismissing the plaintiff's section 1983 claim to the extent that it was based upon a violation of the Ninth Amendment because "[t]he Ninth Amendment is recognized as a rule of construction and does not protect any specific right.") (citation omitted). Accordingly, the District Attorney's motion to dismiss the plaintiff's third cause of action is granted.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the State Defendants' motion to dismiss the amended complaint is granted; and it is further

ORDERED, that the District Attorney's motion for judgment on the pleadings is granted; and it is further

ORDERED, that the amended complaint is dismissed; and it is further

ORDERED, that the Clerk of the Court is directed to close this case.

SO ORDERED.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and his successors,

Defendants.

MEMORANDUM OF DECISION AND ORDER

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03 Civ. 0786

APPEARANCES:

JAMES M. MALONEY, ESQ.
Pro Se Plaintiff
33 Bayview Avenue
Port Washington, New York 11050

ELIOT SPITZER
Attorney General of the State of New York
200 Old Country Road, Suite 460
Mineola, New York 11501
By: Dorothy Oehler Nese, Assistant Attorney General

SPATT, District Judge.

This action seeks a declaration that sections 265.00 and 265.02 of the New York Penal Law which prohibit the in home possession of nunchaku are unconstitutional as violative of the First, Second, Fifth, Eighth, Ninth, and Fourteenth Amendments to the Constitution of the United States.

Presently before the Court is a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure ("Fed. R. Civ. P.") by the Plaintiff James M. Maloney ("Maloney" or the "Plaintiff").

I. BACKGROUND

On February 18, 2003, Maloney, an attorney proceeding pro se, commenced this action pursuant to 28 U.S.C. §§ 1331 and 2201 against New York Attorney State Attorney General Eliot Spitzer ("Attorney General" or the "Defendant"), and Nassau County District Attorney Denis Dillon ("Dillon") in their official capacities seeking a declaratory judgment that the above mentioned New York State Penal Laws are unconstitutional. The Plaintiff subsequently discontinued the action against Dillon in the interest of saving the taxpayer's money.

The following facts are taken from the parties' Rule 56.1 statements and supporting affidavits and are not in dispute unless otherwise stated.

In 2000 and 2002, the Attorney General reached settlements in two civil rights lawsuits against out of state martial arts equipment suppliers which had provided a product called nunchaku to New York residents by mail order and internet sales. New

York Penal Law § 265.00(14) defines nunchaku as follows:

> Chuka stick means any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking or choking. These devices are also known as nunchakus and centrifugal force sticks.

As part of these settlements, the suppliers were required to provide the Attorney General with a list of New York customers who had purchased nunchaku from the companies. Also, the suppliers had to deliver written notice to their New York customers advising them to surrender these weapons to law enforcement agencies. The Plaintiff did not indicate whether he received such a notice.

On August 24, 2000, Maloney was arrested and charged with six violations of the New York Penal Law, including one count of criminal possession of a weapon in the fourth degree, for possessing a nunchaku in his home in violation of New York Penal law §265.01. This section states in part:

> A person is guilty of criminal possession of a weapon in the fourth degree when:
>
> (1) He possesses any firearm, electronic dart gun, electronic stun gun, gravity knife, switchblade

> knife, pilum ballistic knife, metal knuckle knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or "Kung Fu star" . . . .

It is undisputed that the criminal charge for possession of a nunchaku was not supported by any allegations that the Plaintiff had used the nunchaku in the commission of a crime; that he carried the nunchaku in public; or engaged in any other prohibited conduct in connection with said nunchaku except for possession in his home. Thus, the only criminal activity alleged against the Plaintiff was his possession of the nunchaku in his home.

On January 28, 2003, the Plaintiff pled guilty to one count of disorderly conduct pursuant to New York Penal Law § 240.20(7), and received a conditional discharge with regard to the other pending charges. In connection with that plea of guilty, the Plaintiff agreed to the destruction of the nunchaku that had been confiscated during his August 24, 200 [sic] arrest. The Plaintiff was also fined $310.

On February 18, 2003, the Plaintiff commenced this action. The complaint alleges that sections 265 through 265.02, insofar as they apply to the possession of nunchaku in one's home are unconstitutional and "[u]njustly restrain and deprive the Plaintiff and other residents of New York from pursuing and obtaining happiness and safety." The Plaintiff now moves for summary judgment seeking a declaration that these statutes are unconstitutional. The Defendant opposes this

motion on the grounds that the Court does not have subject matter jurisdiction over this case under Article II, and the Plaintiff fails to state a cause of action for a constitutional violation.

II. DISCUSSION

A. Applicable Law

A motion for summary judgment should be granted only when "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2550, 91 L. Ed.2d 265 (1986). The moving party bears the burden of establishing the absence of a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L. Ed.2d 202 (1986); *Niagara Mohawk Power Corp. v. Jones Chemical Inc.*, 315 F.3d 171, 175 (2d Cir. 2003) (quoting *Anderson*, 477 U.S. at 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202).

In deciding a motion for summary judgment, the Court must view the evidence in the light most favorable to the non-moving party and must draw all permissible inferences from the submitted affidavits, exhibits, interrogatory answers, and depositions in favor of that party. *See Anderson*, 477 U.S. 242, 255; *Vann v. City of New York*, 72 F.3d 1040, 1048-49 (2d Cir. 1995). Disputed facts that are not material to the issue at hand will not defeat summary judgment. *See Anderson*, 477 U.S. at 248, 106 S. Ct. at 2510; *Lane v. New York State Electric & Gas Corp.*, 18 F.3d 172, 176 (2d Cir. 1994).

Finally, even though the Plaintiff is proceeding pro se, he is an attorney duly licensed to practice law in the State of New York and in the United States District Court for the Eastern District of New York. As such, the Plaintiff is not entitled to the same leeway as generally afforded to pro se litigants who are not attorneys. *See Goel v. United States DOJ.*, No. 03 Civ. 0579, 2003 U.S. Dist. LEXIS 15066, at *5 (S.D.N.Y. Aug. 27, 2003); *Smith v. Plati*, 258 F.3d 1167, 1174 (10th Cir. 2001) ("While we are generally obliged to construe pro se pleadings liberally, we decline to do so here because [the plaintiff] is a licensed attorney.").

B. As to Standing

The Attorney General argues that the Plaintiff does not have standing to pursue this case, in part because the Attorney General is not responsible for the enforcement of the Penal Law in question. The Court agrees.

Article III of the Constitution limits federal jurisdiction to cases and controversies. Indeed, standing "is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed.2d 351 (1992). The party invoking federal jurisdiction bears the burden of establishing the elements of standing." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). These elements are as follows:

> First, the plaintiff must have suffered an injury in fact — an invasion of a legally protected interest which is (a)

> concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

McCormick ex rel. McCormick v. School Dist. of Mamaroneck, 370 F.3d 275 (2d Cir. 2004) (quoting *Lujan*, 504 U.S. at 560-61).

To satisfy the first element, namely that there be an "injury in fact," the Plaintiff must establish that the alleged injury is concrete, particularized, and "must affect the plaintiff in a personal and individual way." *Defenders of Wildlife*, 504 U.S. at 560 n. 1, 112 S. Ct. 2130; *see also Raines v. Byrd*, 521 U.S. 811, 819, 117 S. Ct. 2312, 138 L. Ed.2d 849 (1997) ("We have consistently stressed that a plaintiff's complaint must establish that he has a 'personal stake' in the alleged dispute, and that the alleged injury suffered is particularized as to him."); *Innovative Health Systems, Inc. v. City of White Plains*, 117 F.3d 37 (2d Cir. 1997). This requirement limits federal jurisdiction to real conflicts so as to "preclude the courts from gratuitously rendering advisory opinions with regard to events in dispute that have not matured to a point sufficiently concrete to demand immediate adjudication and thus may never materialize as actual controversies." *Dow Jones v. Harrods, Ltd.*, 237 F. Supp. 2d 394, 405 (2d Cir. 2002), affd., 346 F.3d 357 (2d Cir. 2003).

In order to establish the existence of an actual controversy in an action seeking a declaration that a criminal statute is unconstitutional, the plaintiff must show either: (1) that they have been arrested, prosecuted, or threatened with prosecution under the statute at issue, or (2) that they have some reasonable fear, which is not "purely imaginative or speculative," of being prosecuted under the statute in the future. *Cherry v. Koch*, 126 A.D.2d 346, 351, 514 N.Y.S. 2d 30, 33 (1987). It is well established that a plaintiff does not have to wait until he is threatened with prosecution before he may challenge a criminal statute that directly operates against him. Doe v. Bolton, 410 U.S. 179, 188 (1973). Rather, the Plaintiff must establish only that he has "an actual and well-founded fear that the law will be enforced against it." *Vt. Right to Life Comm. v. Sorrell*, 221 F.3d 376, 382 (2d Cir., 2000), citing Virginia v. American Booksellers Ass'n, 484 U.S. 383, 393, 98 L. Ed. 2d 782, 108 S. Ct. 636 (1988).

In the case at bar, in addition to having already been arrested and prosecuted for the possession of nunchaku in his home, there is no dispute that he intends to posses nunchaku in his home, "provided that he may do so lawfully." Plf. Mem. In Sup. 7-8. Nevertheless, because the Attorney General, the only remaining defendant in this case, is not the party responsible for the potential prosecution of the Plaintiff, as set forth below, his motion for summary judgment against the Attorney General is denied.

In a case such as this, where a plaintiff seeks a declaration that a particular statute is unconstitutional, "the proper defendants are the government officials charged with the

administration and enforcement of the statute." *Curtis v. Pataki*, No. 96 Civ. 425, 1997 WL 614285, at *5 (Oct. 1, 1997 N.D.N.Y.) (citing *New Hampshire Right to Life Committee v. Gardner*, 99 F.3d 8, 13 (1st Cir.1996) (citations omitted)). "It is well established in New York that the district attorney, and the district attorney alone, should decide when and in what manner to prosecute a suspected offender." *Baez v. Hennessy*, 853 F.2d 73, 76 (2d Cir. 1988) (citations omitted). In fact, "since 1796 the Legislature has never accorded general prosecutorial power to the Attorney General[."] Indeed, this Court has pointed out that "the Attorney-General has no . . . general authority [to conduct prosecutions] and is without any prosecutorial power except when specifically authorized by statute." *People v. Gilmour*, 98 N.Y.2d 126, 130, 746 N.Y.S.2d 114, 773 N.E.2d 479 (2002) (internal quotations and citations omitted). Thus, the choice as to whether to prosecute is entirely within the discretion of a district attorney. *People v. Eboli*, 34 N.Y.2d 281, 289, 357 N.Y.S.2d 435, 313 N.E.2d 746 (1974).

Although New York Executive Law § 63(3) allows "'the head of any . . . department, authority, division or agency' to activate the Attorney General's prosecutorial powers," *Gilmour*, 98 N.Y.2d at 132 (citing N.Y. Exec. § 63(3)), in this case, there is no evidence or assertion that any such request has been made or is likely to be made in the future. Even though the Attorney General settled two civil cases with out of state martial arts retailers, the Court finds that the Attorney General has no responsibility for administering or enforcing the criminal statutes

in question, and that he is not an appropriate defendant in this case.

Accordingly, the motion by the Plaintiff for summary judgment is denied on the basis that the Court has no subject matter jurisdiction over this matter because the Plaintiff has no reasonable fear of prosecution by the Attorney General [sic]

C. Leave to Amend

Rule 15(a) of the Federal Rules of Civil Procedure states that leave to amend a pleading "shall be freely given when justice so requires." In that regard, even if not requested by the Plaintiff, the Court may *sua sponte* grant leave to amend. *Straker v. Metropolitan Transit Authority*, 333 F. Supp.2d 91, 102 (E.D.N.Y. 2004). Accordingly, the Plaintiff is granted leave to serve a supplemental summons and amended complaint against the entity responsible for the potential prosecution of the Plaintiff under the statutes in question. The Plaintiff is directed to serve and file the supplemental and amended complaint within 30 days from the date of this order.

III. CONCLUSION

Based on the foregoing, it is hereby

ORDERED, that the motion by the Plaintiff for summary judgment against the defendant Eliot Spitzer pursuant to Fed. R. Civ. P. 56 is **DENIED**; and it is further

ORDERED, that the Plaintiff is granted leave to serve and file a supplemental summons and amended complaint adding the entity allegedly

responsible for the potential prosecution of the Plaintiff under the statutes in question within 30 days from the date of this order; and it is further

ORDERED, that failure to serve and file a supplemental summons and amended complaint within the specified time period will result in dismissal of this action.

SO ORDERED.

Dated: Central Islip, New York
August 31, 2005

ARTHUR D. SPATT
United States District Judge

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, GEORGE PATAKI, in his official capacity as Governor of the State of New York, and DENIS DILLON, in his official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

AMENDED VERIFIED COMPLAINT

Case No. 03 Civ. 0786 (ADS)(MLO)

JAMES M. MALONEY, proceeding *pro se*, and pursuant to the Memorandum of Decision and Order

of the Honorable Arthur D. Spatt dated August 31, 2005 (the "8/31 Order"), as and for his amended verified complaint against the above-named defendants solely in their official capacity, alleges:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff was and is a natural person, a citizen of the United States, and a resident of the State of New York, of the County of Nassau, and of this District.

2. At the commencement of this action and at all times hereinafter mentioned, Defendant ELIOT SPITZER was and is a natural person and was and is the Attorney General of the State of New York.

3. At the commencement of this action and at all times hereinafter mentioned, Defendant GEORGE PATAKI was and is a natural person and was and is the Governor of the State of New York.

4. The Governor is charged by Article IV, section 3 of the Constitution of the State of New York with the duty to take care that the laws are faithfully executed, and accordingly has sufficient connection with the enforcement of statutes to make him a proper defendant in a suit for declaratory relief challenging the validity of certain applications of New York statutes.

5. At the commencement of this action and at all times hereinafter mentioned, Defendant DENIS DILLON was and is a natural person and was and is the District Attorney of the County of Nassau (hereinafter, the "District Attorney").

6. The District Attorney is the personal responsible for the potential prosecution of Plaintiff under the criminal statutes in question. As more fully appears herein, Defendant DENIS DILLON has actually prosecuted Plaintiff under said criminal statutes.

JURISDICTION AND VENUE

7. This action arises under the Constitution of the United States. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and has the power to render declaratory judgment and further relief pursuant to the provisions of 28 U.S.C. §§ 2201-2202.

8. Venue is properly placed in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

GENERAL BACKGROUND

9. On or about August 24, 2000, Plaintiff possessed in his home one or more martial arts devices known as nunchaku or "chuka sticks," consisting of foot-long wooden sticks connected by a cord, the possession of which is defined as a crime by sections 265.00 *et seq.* of the Penal Law of the State of New York, as more fully appears herein.

10. On or about August 24, 2000, The People of the State of New York, through the office of Defendant DENIS DILLON, charged Plaintiff with criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at section 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku

that was found by Nassau County Police in Plaintiff's home.

11. The aforementioned criminal charge for possession of a nunchaku was based solely on allegations of simple possession of said nunchaku in Plaintiff's home, and was not supported by any allegations that Plaintiff had: (a) used said nunchaku in the commission of a crime; (b) carried or displayed the nunchaku in public; or (c) engaged in any other improper or prohibited conduct in connection with said nunchaku except for such simple possession within his home, nor is any such conduct an element of the defined crime.

12. The aforementioned criminal charge for possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003.

13. Upon information and belief, said dismissal was not based on any explicit or implicit recognition by the District Attorney that said statutes, as applied against Plaintiff and defining as a crime the simple possession of nunchaku within one's home, are or were unconstitutional.

PLAINTIFF'S BACKGROUND AND STANDING TO SUE

14. Plaintiff has been a student of the martial arts since approximately 1975, when he began studying Uechi-Ryu, an Okinawan style of karate, under the tutelage of Vincent Pillari in Fort Lee, New Jersey. Plaintiff has subsequently studied various styles of martial arts, including other Okinawan styles of karate, the Ving Tsun or "Wing

Chun" style of kung fu, and aikido. Drawing from these and other influences, Plaintiff formulated his own martial arts style, known as Shafan Ha-Lavan, beginning in 1998. Shafan Ha-Lavan incorporates the use of the nunchaku as an integral and essential part of its training and technique.

15. Since 1975, Plaintiff has trained in a peaceful manner with the nunchaku, and has acquired numerous nunchaku, which are or were his personal property.

16. Plaintiff has never used a nunchaku to inflict harm or physical injury on another human being or on an animal, and has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and coordination.

17. Plaintiff first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because Plaintiff's father, John Maloney, had been fatally stabbed in 1964, when Plaintiff was five years old.

18. Since 1980, Plaintiff has served honorably as, and remains, a commissioned officer in the U.S. Naval Reserve. From 1986 to 1995, he served as a paramedic in New York City's 911 Emergency Medical Services system, and observed numerous instances of serious injury or fatality due to wounds inflicted by assailants armed with knives and other sharp instruments.

19. Plaintiff has ties to and roots in the State of New York (including being licensed to practice law in

all of the State's courts and in four federal courts sitting therein, consisting of two District Courts, the Court of Appeals for the Second Circuit, and the Court of International Trade) and cannot conveniently relocate, nor does he wish to do so.

20. Because Plaintiff was charged with a Class A misdemeanor for the simple possession of a nunchaku in his own home, and for more than two years lived under the constant threat of being imprisoned for up to one year in punishment therefor, Plaintiff must reasonably either: (1) forgo possession of any nunchaku within his own home; (2) move from the State; or (3) risk being the target of another prosecution for disobeying the same law.

21. In addition to having already been arrested and prosecuted for the possession of nunchaku in his home, Plaintiff intends to possess nunchaku in his home provided that he may do so lawfully. Thus, Plaintiff is forced to choose between risking further criminal prosecution and forgoing what may be constitutionally protected conduct (i.e., possessing nunchaku in his home for legitimate purposes).

22. Plaintiff accordingly has standing to seek declaratory judgment on the question of the constitutionality of those New York statutes that criminalize the simple possession of nunchaku within one's home.

THE NUNCHAKU AND ITS REGULATION BY VARIOUS GOVERNMENTS

23. Upon information and belief, the nunchaku was originally a farm implement, and was developed centuries ago for use as a weapon on the island of

Okinawa after invading oppressive governments attempted to disarm the people there.

24. Upon information and belief, the nunchaku had already been used as an "arm" or weapon for the common defense, by the citizens' militias of Okinawa, well before the dates of the ratification of the United States Constitution and of the first ten amendments thereto.

25. The nunchaku, unlike most other weapons, including firearms, knives, swords and all other penetrating weapons, is capable of being used in a restrained manner such that an opponent may be subdued without resorting to the use of deadly physical force.

26. The nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or person untrained in the weapon's proper use would be unable to inflict serious injury upon him- or herself, either accidentally or intentionally.

27. Accordingly, nunchaku kept in the home, even if not secured in a locked compartment, are far less likely to be associated with serious injury or fatality than are most other weapons or even common household objects such as kitchen knives and scissors.

28. Upon information and belief, the States of Connecticut, Massachusetts and Pennsylvania all have enacted statutes defining as a crime the possession of nunchaku in certain places, such as in a vehicle (Connecticut General Statutes § 29-38), on one's person in public areas (Massachusetts General

Laws, Chapter 269, § 10), or on school grounds (Pennsylvania Statutes § 13-1317.2(g)).

29. Upon information and belief, no state other than New York and California has defined and prosecuted as a crime the mere possession of nunchaku within one's own home.

30. New York Penal Law § 265.00 (14) (one of two subsections so numbered) defines a "chuka stick" (i.e., nunchaku) in substantial part as follows: "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking . . ."

31. New York Penal Law §§ 265.01 and 265.02 define the possession of a "chuka stick" (i.e., nunchaku) as a Class A misdemeanor and as a Class D felony, respectively, and make no exception from criminal liability for the simple possession of a nunchaku or "chukka stick" within one's own home. As alleged in paragraphs 9 through 11, *supra*, the District Attorney interpreted § 265.01 as reaching such simple possession in prosecuting Plaintiff.

32. Upon information and belief, the New York bill that made mere possession of nunchaku, even in one's own home, a crime, was signed into law on April 16, 1974, and became effective on September 1, 1974.

33. Upon information and belief, a memorandum from the State of New York Executive Department's Division of Criminal Justice Services to the office of

the Governor dated April 4, 1974, pointed out that nunchaku have legitimate uses in karate and other martial-arts training, and opined that "in view of the current interest and participation in these activities by many members of the public, it appears unreasonable — and perhaps even unconstitutional — to prohibit those who have a legitimate reason for possessing chuka sticks from doing so." A true copy of said memorandum is annexed hereto as Exhibit 1.

34. Upon information and belief, the memorandum annexed hereto as Exhibit 1 was received by the office of the Governor on April 9, 1974, before the bill banning nunchaku in New York was signed into law.

35. Upon information and belief, a letter and report from the Committee on the Criminal Court of the New York County Lawyers' Association to the Governor dated May 3 and April 29, 1974, respectively, opined that "[w]hile the possession of [nunchaku] with demonstrable criminal intent is a proper subject of legislation, the proposed legislation goes further, making the mere possession (even absent criminal intent) a criminal offense. If it is the desire of the legislature to prohibit the use of nunchakus in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end." True copies of said letter and report annexed hereto as Exhibit 2.

36. Upon information and belief, the letter and report annexed hereto as Exhibit 2 were received by the office of the Governor on May 7, 1974, after the bill banning nunchaku in New York had already been signed into law.

37. Since 1974, courts outside the State of New York have recognized that nunchaku have socially acceptable uses. In 1981, an Arizona appellate court sustaining a conviction for criminal possession of nunchaku recognized that nunchaku have socially acceptable purposes, noting that "the use of nunchakus in the peaceful practice of martial arts or the possession for such use is not a crime." *State v. Swanton*, 629 P.2d 98, 99 (Ariz. Ct. App. 1981).

38. A District of Columbia appellate court noted in 1983: "Since we are making a ruling concerning a weapon which apparently has not previously been the subject of any published opinions in this jurisdiction, it is worth making a few further observations about the nunchaku. Like the courts of other jurisdictions, we are cognizant of the cultural and historical background of this Oriental agricultural implement-turned-weapon. We recognize that the nunchaku has socially acceptable uses within the context of martial arts and for the purpose of developing physical dexterity and coordination. " *In re S.P., Jr.*, 465 A.2d 823, 827 (D.C. 1983).

39. In 1984, an Ohio appellate court reversed a criminal conviction for possession of nunchaku, holding that "the evidence tends to indicate that the device was used only for lawful purposes" and that "[m]ere possession of an otherwise lawful article . . . does not make it illegal." *State v. Maloney*, 470 N.E.2d 210, 211 (Ohio Ct. App. 1984).

CONSTITUTIONAL BASES FOR THE CHALLENGE

40. This action challenges the constitutionality of the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent on three independent bases, corresponding to the first three causes of action.

41. The first basis is that peaceful training with and twirling of the nunchaku is expressive conduct, which conduct is protected by the First Amendment to the Constitution of the United States ("First Amendment").

42. The second basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate rights specifically conferred by the Second Amendment to the Constitution of the United States ("Second Amendment"), provided that the Second Amendment guarantees a personal right and is applicable as against the states.

43. The third basis is that the application of the aforementioned New York statutes to criminalize possession of nunchaku in one's own home without criminal intent would violate unenumerated rights, including those involving protection of the person from unwarranted government intrusions into a dwelling or other private place, as recently recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

44. As more fully appears herein, unenumerated rights are specifically guaranteed by the Ninth

Amendment to the Constitution of the United States ("Ninth Amendment"), but have largely been recognized in American constitutional jurisprudence under the doctrine of substantive due process. Either approach may draw inferentially from the first eight amendments to the Constitution of the United States and/or from other sources in establishing the scope and content of rights not enumerated.

FIRST CAUSE OF ACTION

45. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

46. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and therefore criminalize peaceful training with and twirling of the nunchaku in the privacy of one's own home, violate the provisions of the First Amendment of the Constitution of the United States.

SECOND CAUSE OF ACTION

47. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

48. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Second Amendment of the Constitution of the United States.

49. In *Bach v. Pataki*, 408 F. 3d 75 (2d Cir. 2005), the Second Circuit held that the Second Amendment is inapplicable to the states.

50. Upon information and belief, a petition for panel rehearing and petition for rehearing *en banc* were filed by the Plaintiff-Appellant in *Bach v. Pataki*, and said petitions were denied.

51. Upon information and belief, the denial of said petitions was issued as a Mandate on August 4, 2005, thereby starting the 90-day period for the Plaintiff-Appellant in *Bach v. Pataki* to petition the United States Supreme Court for *certiorari*. A true copy of the Mandate is annexed hereto as Exhibit 3.

52. Given the foregoing, and the resultant possibility of reversal of *Bach v. Pataki*, this cause of action is not frivolous even though it is not actually viable at the time of filing this amended verified complaint.

THIRD CAUSE OF ACTION

53. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 44 as if fully set forth herein.

54. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate unenumerated rights, including, without limitation: (a) those rights guaranteed by the Ninth Amendment; (b) those rights recognized under the doctrine substantive due process; (c) those rights recognized by the United States Supreme Court in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003); (d) those rights guaranteed by the Fourteenth Amendment and (e) those rights the existence of which may be drawn inferentially ("penumbras and emanations") from a reading of the first eight

amendments to the Constitution of the United States and/or of the Declaration of Independence.

FOURTH CAUSE OF ACTION (AS AGAINST THE ATTORNEY GENERAL)

55. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 54 as if fully set forth herein.

56. Upon information and belief, in 2000 and 2002, the Attorney General reached settlements in two civil lawsuits against out-of-state martial arts equipment suppliers, Family Defense Products, Inc. of Ocala, Florida, and Bud K World Wide, Inc. of Moultrie, Georgia (collectively, the "Companies"), which had provided nunchaku to New York residents by mail order and/or Internet sales.

57. Upon information and belief, as part of these settlements, the Companies were required to provide the Attorney General with a list of the names and addresses of all New York customers who had ever purchased nunchaku from the Companies.

58. Upon information and belief, as part of these settlements, the Companies also were required to deliver written notice to their New York customers advising them to surrender their weapons to law enforcement agencies. A true copy of the draft form of one such written notice is annexed hereto as Exhibit 4.

59. Should this Court find that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect, the

statutes themselves would remain unchanged unless the legislature amended them.

60. Many persons who received the written notices described above would likely still be under the impression that simple possession of nunchaku in their own homes for peaceful use in martial arts training is illegal and could subject them to up to a year in prison.

61. Such persons would also be aware that the State of New York has their names and addresses by virtue of the Attorney General's settlements as described above.

62. Accordingly, equity would require that such persons be notified of any decision by a court protecting their right to possess nunchaku in their own homes for peaceful use in martial arts training.

63. Further, because the Attorney General received a list of the names and addresses of New York customers who had purchased nunchaku from the Companies (see paragraph 57, above), notifying those persons of such a decision would not be unduly burdensome.

64. Under the provisions of 28 U.S.C. § 2202, this Court has the power to grant the relief sought herein.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action;

(2) declare that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple

possession of nunchaku within one's home are unconstitutional and of no force and effect;

(3) grant appropriate equitable relief as described in the Fourth Cause of Action, such as an affirmative injunction requiring the Attorney General to notify any persons who received the notice described in paragraph 58, above, that they may not be criminally prosecuted for the simple possession of nunchaku in their own homes for peaceful use in martial arts training; and

(4) grant such other, further, and different relief as this Court may deem just and proper.

Dated: September 3, 2005
Port Washington, New York

/s/

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050

(516) 767-1395

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
Telephone: (516) 767-1395

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

JAMES M. MALONEY,

Plaintiff,

- against -

ELIOT SPITZER, in his official capacity as Attorney General of the State of New York, and DENIS DILLON, in his official capacity as District Attorney of the County of Nassau, and their successors,

Defendants.

CIVIL COMPLAINT

Case No. CV 03 786

James M. Maloney, an attorney at law admitted to practice before this Honorable Court, proceeding *pro se*, as and for his complaint against the above-

named defendants in their official capacity, hereby affirms under penalty of perjury as follows:

PARTIES

1. At the commencement of this action and at all times hereinafter mentioned, Plaintiff was and is a natural person, a citizen of the United States, and a resident of the State of New York, of the County of Nassau, and of this District.

2. At the commencement of this action and at all times hereinafter mentioned, Defendant ELIOT SPITZER was a natural person and was the Attorney General of the State of New York, with offices within this District located at Mineola and Hauppauge, and Defendant DENIS DILLON was a natural person and was the District Attorney of the County of Nassau (hereinafter, the "District Attorney"), with offices within this District located at Mineola.

JURISDICTION AND VENUE

3. This action arises under the Constitution of the United States. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331, and has the power to render declaratory judgment, the only relief sought herein, pursuant to the provisions of 28 U.S.C. § 2201.

4. Venue is properly placed in the United States District Court for the Eastern District of New York pursuant to 28 U.S.C. § 1391(b).

GENERAL BACKGROUND

5. On or about August 24, 2000, Plaintiff possessed in his home one or more martial arts devices known as nunchaku or "chuka sticks,"

consisting of foot-long wooden sticks connected by a cord, the possession of which is defined as a crime by sections 265.00 *et seq.* of the Penal Law of the State of New York, as more fully appears herein.

6. On or about August 24, 2000, The People of the State of New York charged Plaintiff with one count of criminal possession of a weapon in the fourth degree, a Class A misdemeanor defined at section 265.01 of the Penal Law of the State of New York, based on Plaintiff's possession within his home of a nunchaku that was seized by Nassau County Police while Plaintiff was absent from his home.

7. The aforementioned criminal charge for possession of a nunchaku was based solely on allegations of simple possession of said nunchaku in Plaintiff's home, and was not supported by any allegations that Plaintiff had: (a) used said nunchaku in the commission of a crime; (b) carried the nunchaku in public; or (c) engaged in any other improper or prohibited conduct in connection with said nunchaku except for such simple possession within his home, nor is any such conduct an element of the defined crime.

8. The aforementioned criminal charge for possession of a nunchaku remained pending against Plaintiff for a period of approximately 29 months, until it was eventually dismissed on or about January 28, 2003.

9. Upon information and belief, said dismissal was not based on any explicit or implicit recognition by the District Attorney that said statutes, as applied against Plaintiff and defining as a crime the

simple possession of nunchaku within one's home, are or were unconstitutional.

PLAINTIFF'S BACKGROUND AND STANDING TO SUE

10. Plaintiff has been a student of the martial arts since approximately 1975, when he began studying Uechi-Ryu, an Okinawan style of karate, under the tutelage of Vincent Pillari in Fort Lee, New Jersey. Plaintiff has subsequently studied various styles of martial arts, including other Okinawan styles of karate, the Ving Tsun or "Wing Chun" style of kung fu, and aikido. Drawing from these and other influences, Plaintiff formulated his own martial arts style, known as Shafan Ha-Lavan, beginning in 1998. Shafan Ha-Lavan incorporates the use of the nunchaku as an integral and essential part of its training and technique.

11. Since 1975, Plaintiff has trained in a peaceful manner with the nunchaku, and has acquired numerous nunchaku, which are or were his personal property.

12. Plaintiff has never used a nunchaku to inflict harm or physical injury on another human being or on an animal, and has used nunchaku only for socially acceptable purposes within the context of martial arts, and to develop physical dexterity and coordination.

13. Plaintiff first became interested in the nunchaku, and began training with it in 1975, in part because the weapon is particularly effective in defense against an assailant armed with a knife or other sharp instrument, and in part because

Plaintiff's father, John Maloney, had been fatally stabbed in 1964, when Plaintiff was five years old.

14. Since 1980, Plaintiff has served honorably as, and remains, a commissioned officer in the U.S. Naval Reserve. From 1986 to 1995, he served as a paramedic in New York City's 911 Emergency Medical Services system, and observed numerous instances of serious injury or fatality due to wounds inflicted by assailants armed with knives and other sharp instruments.

15. Plaintiff has ties to and roots in the State of New York (including being licensed to practice law in all of the State's courts and in four federal courts sitting therein, consisting of two District Courts, the Court of Appeals for the Second Circuit, and the Court of International Trade) and cannot conveniently relocate, nor does he wish to do so.

16. Because Plaintiff was charged with a Class A misdemeanor for the simple possession of a nunchaku in his own home, and for more than two years lived under the constant threat of being imprisoned for up to one year in punishment therefor, Plaintiff must reasonably either: (1) forgo possession of any nunchaku within his own home; (2) move from the State; or (3) risk being the target of another prosecution for disobeying the same law.

17. Plaintiff accordingly has standing to seek declaratory judgment on the question of the constitutionality of those New York statutes that criminalize the simple possession of nunchaku within one's home, as those statutes have been applied to prosecute Plaintiff.

THE NUNCHAKU AND ITS REGULATION BY VARIOUS GOVERNMENTS

18. Upon information and belief, the nunchaku was originally an agricultural implement used for threshing rice, and was developed centuries ago for use as a weapon on the island of Okinawa after invading oppressive governments attempted to disarm the people there.

19. Upon information and belief, the nunchaku had already been used as an "arm" or weapon for the common defense, by the citizens' militias of Okinawa, well before the dates of the ratification of the United States Constitution and of the first ten amendments thereto.

20. The nunchaku, unlike most other weapons, including firearms, knives, swords and all other penetrating weapons, is capable of being used in a restrained manner such that an opponent may be subdued without resorting to the use of deadly physical force.

21. The nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or other person untrained in the weapon's proper use would be unable to inflict serious injury upon him- or herself, either accidentally or intentionally.

22. Accordingly, nunchaku kept in the home, even if not secured in a locked compartment, are far less likely to be associated with serious injury or fatality than are most other weapons or even common household objects such as kitchen knives and scissors.

23. Upon information and belief, the States of Connecticut, Massachusetts and Pennsylvania all have enacted statutes defining as a crime the possession of nunchaku in certain places, such as in a vehicle (Connecticut General Statutes § 29-38), on one's person in public areas (Massachusetts General Laws, Chapter 269, § 10), or on school grounds (Pennsylvania Statutes § 13-1317.2(g)).

24. Upon information and belief, no State in the United States, other than New York, has ever defined and prosecuted as a crime the simple possession of nunchaku within one's own home.

25. New York Penal Law § 265.00 (14) (one of two subsections so numbered) defines a "chuka stick" (i.e., nunchaku) in substantial part as follows: "any device designed primarily as a weapon, consisting of two or more lengths of a rigid material joined together by a thong, rope or chain in such a manner as to allow free movement of a portion of the device while held in the hand and capable of being rotated in such a manner as to inflict serious injury upon a person by striking . . ."

26. New York Penal Law §§ 265.01 and 265.02 define the possession of a "chuka stick" (i.e., nunchaku) as a Class A misdemeanor and as a Class D felony, respectively, and make no exception from criminal liability for the simple possession of a nunchaku or "chuka stick" within one's own home. As alleged in paragraphs 6 through 8, *supra*, the District Attorney interpreted § 265.01 as reaching such simple possession in prosecuting Plaintiff.

FIRST CAUSE OF ACTION

27. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 26 as if fully set forth herein.

28. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, unjustly restrain and deprive Plaintiff and other residents of New York from pursuing and obtaining happiness and safety.

SECOND CAUSE OF ACTION

29. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 28 as if fully set forth herein.

30. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the practice and display of nunchaku-based martial arts, violate the provisions of the First Amendment of the Constitution of the United States.

THIRD CAUSE OF ACTION

31. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 30 as if fully set forth herein.

32. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Second Amendment of the Constitution of the United States.

FOURTH CAUSE OF ACTION

33. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 32 as if fully set forth herein.

34. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and thereby constitute a regulatory taking of private property without just compensation, violate the provisions of the Fifth Amendment of the Constitution of the United States.

FIFTH CAUSE OF ACTION

35. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 34 as if fully set forth herein.

36. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes, together with provisions in Article 70 of the Penal Law, permit or require the imposition of unduly harsh penalties for the simple possession of nunchaku within one's home, violate the provisions of the Eighth Amendment of the Constitution of the United States.

SIXTH CAUSE OF ACTION

37. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 36 as if fully set forth herein.

38. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and the peaceful use of such nunchaku

therein, violate the provisions of the Ninth Amendment of the Constitution of the United States.

SEVENTH CAUSE OF ACTION

39. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 38 as if fully set forth herein.

40. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home, violate the provisions of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States.

EIGHTH CAUSE OF ACTION

41. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 40 as if fully set forth herein.

42. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's home and do so without a rational basis for furthering any legitimate state interest, violate the provisions of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

NINTH CAUSE OF ACTION

43. Plaintiff repeats and realleges each and every allegation set forth in the foregoing paragraphs 1 through 42 as if fully set forth herein.

44. New York Penal Law §§ 265.00 through 265.02, to the extent that said statutes criminalize the simple possession of nunchaku within one's

home, violate the provisions of the Privileges and Immunities Clause of the Fourteenth Amendment of the Constitution of the United States.

WHEREFORE, Plaintiff respectfully requests that this Court:

(1) assume jurisdiction over this action; and

(2) declare that those portions of sections 265.00 through 265.02 of the New York Penal Law that define and punish as a crime the simple possession of nunchaku within one's home are unconstitutional and of no force and effect.

Plaintiff additionally prays for such other, further, and different relief as this Court may deem just and proper.

I declare under penalty of perjury under the laws of the United States of America that the foregoing statements of fact are true and correct to the best of my knowledge.

Dated: Port Washington, New York
February 18, 2003

/s/

JAMES M. MALONEY (JM-3352)
Plaintiff *pro se*
33 Bayview Avenue
Port Washington, New York 11050
(516) 767-1395
jmm257@nyu.edu
http://homepages.nyu.edu/~jmm257

New York County Lawyers' Association
14 Vesey Street — Facing St. Paul's
New York, N.Y. 10007

For further information
please communicate with:
Gregory J. Perrin, Esq.
225 Broadway, R-2515
New York, N. Y. 10007
349-1390

May 3, 1974

Hon. Malcolm Wilson
Executive Chamber
Albany, N. Y. 12224

My dear Sir:

The Committee on the Criminal Court of the New York County Lawyers' Association has disapproved the following bill and believes that it should not become law:

A. 8359-A
A. 8667-A

A copy of a report recommending disapproval is enclosed.

Very truly yours,

BENJAMIN LEVINE
Chairman, Committee on State Legislation

INTRODUCED BY ASSEMBLYMAN MANNIX
INTRODUCED BY SENATORS, PISANI,
ACKERSON, GORDON, FLYNN, KNORR
INTRODUCED BY ASSEMBLYMAN ROSS; Multi-sponsored by: ASSEMBLYMEN BROWN, HURLEY, LEVY, LOPRESTO, MANNIX, SUCHIN, VOLKER, ABRAMSON
INTRODUCED BY SENATORS BARCLAY, PADAVAN

April 29, 1974 Report No. 184 A. 8359-A
Same as S. 7685
A. 8667-A
Same as S. 9034

NEW YORK COUNTY LAWYERS' ASSOCIATION
14 Vesey Street - New York 10007

Report of Committee on the Criminal Court on Assembly Bill 8359-A same as Senate Bill 7685, Assembly Bill 8667-A same as Senate Bill 9034, which seek to amend Sections 265.00, 265.05, 265.10, 265.15 of the Penal Law with regard to the possession of certain weapons.

RECOMMENDATION: DISAPPROVAL

Both of these bills seek to add "nunchakus" to the list of weapons the possession of which is proscribed by Article 265 of the Penal Law.

Both bills have been amended and recommitted by substitute bill in Assembly. The amendments, in both cases, removed from the proposed legislation the presumption, from mere possession, of an intent to use the proscribed device unlawfully against

another. In place of this presumption, both bills now make unlawful the mere possession of nunchakus, without regard to the issue of unlawful intent.

While it is true that nonchakus, chuka sticks and like objects are capable of use in criminal conduct, it is the sense of this Committee that they are not properly included in the provisions of Article 265 of the Penal Law as proposed.

While the possession of these items with demonstrable criminal intent is a proper subject for legislation, the proposed legislation goes further, making mere possession (even absent criminal intent) a criminal offense. If it is the desire of the legislature to prohibit the use of nunchakus in criminal conduct, a more narrowly drawn statute can be fashioned to achieve this end.

Respectfully submitted,

COMMITTEE ON THE CRIMINAL COURT
Gregory J. Perrin, Chairman

Report prepared for
the Committee by
MR. ALAIN M. BOURGEOIS

STATE OF NEW YORK
DEPARTMENT OF LAW
ALBANY 12224

Louis J. Lefkowitz
ATTORNEY GENERAL

MEMORANDUM FOR THE GOVERNOR

Re: Assembly 8667-A

Penal Law, section 265.05, subdivision 9, lists weapons, dangerous instruments and appliances, the possession of which with intent to use unlawfully, constitutes (1) a Class A misdemeanor or (2) a Class D felony if the possessor has previously been convicted of any crime.

The purpose of this bill would be to amend Penal Law, section 265.05, subdivision 9, by adding the "Chuka stick" to the class of weapons listed under that section. Additionally, Penal Law, section 265.10, subdivisions 1 and 2 which pertain to the manufacture and transportation of prohibited instruments, respectively, would also be amended by adding the "Chuka stick". Penal Law, section 265.16, subdivision 3, which relates to the presence of prohibited items (e.g., weapons, dangerous instruments and appliances) in an automobile, would also be amended adding the "Chuka stick" to its provisions.

This act would take effect on the first day of September next succeeding the date on which it shall have become law. A definition of "Chuka stick"

would be added by this bill to Penal Law, section 265.00, subdivision 14. A portion of the definition of a "Chuka stick" states that it is a device "* * * consisting of two or more lengths of rigid material joined together with a thong, rope or chain * * *". This phrase could possibly be construed to include some harmless items such as a child's jump rope or skip rope. However, an additional phrase in the definition would require that it be a "* * * device designed primarily as a weapon * * *". This phrase would appear to avoid any confusion in the definition with items not intended to fall within the act's purview.

This bill would place controls on the use of an instrument, "i.e., the Chuka stick" which has apparently been widely used by muggers and street gangs and has been the cause of many serious injuries.

A similar bill was introduced during the 1973 Legislative Session but it did not come out of the Codes Committee during the 1973 Session.

I find no legal objection to this bill.

Dated: April 8, 1974

Respectfully submitted,

/s/
LOUIS J. LEFKOWITZ
Attorney General

MEMORANDUM

STATE OF NEW YORK
EXECUTIVE DEPARTMENT
DIVISION OF CRIMINAL JUSTICE SERVICES

April 4, 1974

TO: Michael Whiteman
FROM: Archibald R. Murray
RE: A. 8667-A

Purpose

To amend a number of sections in Article 265 of the Penal Law to penalize the possession of, manufacture or dealing in "chuka sticks."

Discussion

This bill proposes to outlaw the possession, manufacture or shipment of "chuka sticks," as that device is defined in bill section 1. By placing the basic prohibition in Penal Law section 265.05 (3), the possession of chuka sticks is made per se criminal, i.e., no *mens rea* is required and the crime, therefore, is one of absolute liability. Even if the chuka stick is being employed with significant frequency as a weapon in the commission of violent crimes, its inclusion in the *per se* category is of doubtful wisdom and questionable legality.

It is our understanding that chuka sticks are also used in karate and other "martial arts" training. In

view of the current interest and participation in these activities by many members of the public, it appears unreasonable — and perhaps even unconstitutional — to prohibit those who have a legitimate reason for possessing chuka sticks from doing so. There are alternative ways in which the problem can be handled. If it is desired to keep chuka sticks in the *per se* prohibited class, an exception could be drafted for those who possess them for lawful martial arts training. Such a course is employed for switchblade and gravity knives, which are also prohibited in this same subdivision (P.L. sec. 265.05[3]). In their case, section 265.20(5) permits their possession for hunting or fishing by a person who has a hunting or fishing license.

A second, and more appropriate, alternative would be to treat chuka sticks under Penal Law section 265.05(9) where, to constitute the crime, possession must be coupled with "an intent to use the same unlawfully against another." This would put chuka sticks in the same category as other objects which are potential weapons but which also have legitimate uses, such as knives and razors.

It should be noted that the first version of this bill (A. 8667) in fact pursued precisely this latter course.

A technical — probably typographical — error appears on page 1, line 4. The word "designated" probably should read "designed."

Recommendation

In view of the foregoing, we cannot recommend approval of this bill in its present form.

THE ASSEMBLY
STATE OF NEW YORK
ALBANY

RICHARD C. ROSS
ASSEMBLYMAN 88TH DISTRICT
FISKE PLACE
MOUNT VERNON, NEW YORK 10580

April 2, 1974

Hon. Michael Whiteman
Executive Chambers
Albany, New York 12224

Re: A-8667-A

Dear Mr. Whiteman:

This will acknowledge receipt of your request for my comments and recommendations concerning my above numbered bill now before the Governor for executive action.

Currently, the law prohibits the possession of a billy, blackjack, bludgeon, metal knuckles, sandbag, sandclub or slungshot. Any person who has in his possession one of these devices is guilty of a class A misdemeanor and is guilty of a class D felony if he has previously been convicted of any crime. The law does not specifically prohibit the possession of a device known as a "chuka stick" which in the past few years has been appearing throughout communities within the State. The chuka stick is an instrument that may be purchased or easily

assembled from two pieces of wood and a piece of thong, cord or chain. With a minimum amount of practice, this instrument may be effectively used as a garrote, bludgeon, thrusting or striking device. The chuka stick is designed primarily as a weapon and has no purpose other than to maim or, in some instances, kill. Unfortunately, there has been disagreement among prosecutors as to the criminal liability attendant to the possession of the chuka stick. The proposed legislation to control the possession and use, as well as the manufacture and transport of chuka sticks would insure uniformity of prosecution which currently varies from county to county within the state of New York.

The said bill was amended to conform to the needs and demands of various municipalities and organizations seeking to include chuka sticks within the definition of dangerous weapons. It has the support of the city of New York and all police associations throughout the state.

Favorable action by the Governor is respectfully requested.

Very truly yours,

/s/
Richard C. Ross

DISTRICT ATTORNEYS ASSOCIATION
STATE OF NEW YORK

April 1, 1974

Honorable Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

Re: 8667-A

Dear Mr. Whiteman:

The District Attorneys Association of the State of New York approves of the above bill, which defines a "chuka stick" and makes possession of one a class A misdemeanor or, in certain circumstances, a class D felony.

As a result of the recent popularity of "Kung Fu" movies and shows, various circles of the state's youth are using such weapons. The chuka stick can kill, and is rightly added to the list of weapons prohibited by section 265.00 of the Penal Law.

Yours truly,

/s/
B. Anthony Morosco
Legislative Secretary

BAM: pag

THE DISTRICT ATTORNEY OF DUTCHESS COUNTY
COURTHOUSE
POUGHKEEPSIE, N.Y. 12601
(914) 485-9880

April 1, 1974

Hon. Michael Whiteman
Executive Chamber
State Capitol
Albany, New York 12224

Gentlemen:

I have been asked by the Bar Association to comment on Assembly 8667-A, a bill which amends Penal Law Section 265.00 to define a "chuka stick". It appears that weapons of this kind are used in the same criminal manner and with a frequency that now approximates other per se contraband weapons set forth in Subdivision 3 of Penal Law Section 265.05. There is no conceivable innocent used for this device and, accordingly, there can be no possible invasion of anyone's right to use it innocently. For that reason I feel that the legislation is salutary and recommend its approval.

Very truly yours,

/s/
ALBERT M. ROSENBLATT
District Attorney

AMR/tp

PERTINENT STATUTORY PROVISION

(Not Reproduced in Body of Petition)

New York Penal Law Section 265.20 (McKinney 2008) provides the following exemptions to the prohibitions on possession in Section 265.01:

§ 265.20 Exemptions

a. Sections 265.01, 265.02, 265.03, 265.04, 265.05, 265.10, 265.11, 265.12, 265.13, 265.15 and 270.05 shall not apply to:

1. Possession of any of the weapons, instruments, appliances or substances specified in sections 265.01, 265.02, 265.03, 265.04, 265.05 and 270.05 by the following:

(a) Persons in the military service of the state of New York when duly authorized by regulations issued by the adjutant general to possess the same.

(b) Police officers as defined in subdivision thirty-four of section 1.20 of the criminal procedure law.

(c) Peace officers as defined by section 2.10 of the criminal procedure law.

(d) Persons in the military or other service of the United States, in pursuit of official duty or when duly authorized by federal law, regulation or order to possess the same.

(e) Persons employed in fulfilling defense contracts with the government of the United States or agencies thereof when possession of the same is necessary for manufacture, transport, installation and testing under the requirements of such contract.

(f) A person voluntarily surrendering such weapon, instrument, appliance or substance, provided that such surrender shall be made to the superintendent of the division of state police or a member thereof designated by such superintendent, or to the sheriff of the county in which such person resides, or in the county of Nassau or in the towns of Babylon, Brookhaven, Huntington, Islip and Smithtown in the county of Suffolk to the commissioner of police or a member of the police department thereof designated by such commissioner, or if such person resides in a city, town other than one named in this subparagraph, or village to the police commissioner or head of the police force or department thereof or to a member of the force or department designated by such commissioner or head; and provided, further, that the same shall be surrendered by such person in accordance with such terms and conditions as may be established by such superintendent, sheriff, police force or department. Nothing in this paragraph shall be construed as granting immunity from prosecution for any crime or offense except that of unlawful possession of such weapons, instruments, appliances or substances surrendered as herein provided. A person who possesses any such weapon, instrument, appliance or substance as an executor or administrator or any other lawful possessor of such property of a decedent may continue to possess such property for a period not over fifteen days. If such property is not lawfully disposed of within such period the possessor shall deliver it to an appropriate official described in this paragraph or such property may be delivered to the superintendent of state police. Such officer shall

hold it and shall thereafter deliver it on the written request of such executor, administrator or other lawful possessor of such property to a named person, provided such named person is licensed to or is otherwise lawfully permitted to possess the same. If no request to deliver the property is received by such official within one year of the delivery of such property, such official shall dispose of it in accordance with the provisions of section 400.05 of this chapter.

2. Possession of a machine-gun, large capacity ammunition feeding device, firearm, switchblade knife, gravity knife, pilum ballistic knife, billy or blackjack by a warden, superintendent, headkeeper or deputy of a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or detained as witnesses in criminal cases, in pursuit of official duty or when duly authorized by regulation or order to possess the same.

3. Possession of a pistol or revolver by a person to whom a license therefor has been issued as provided under section 400.00 or 400.01 of this chapter; provided, that such a license shall not preclude a conviction for the offense defined in subdivision three of section 265.01 of this article.

4. Possession of a rifle, shotgun or longbow for use while hunting, trapping or fishing, by a person, not a citizen of the United States, carrying a valid license issued pursuant to section 11-0713 of the environmental conservation law.

5. Possession of a rifle or shotgun by a person other than a person who has been convicted of a

class A-I felony or a violent felony offense, as defined in subdivision one of section 70.02 of this chapter, who has been convicted as specified in subdivision four of section 265.01 to whom a certificate of good conduct has been issued pursuant to section seven hundred three-b of the correction law.

6. Possession of a switchblade or gravity knife for use while hunting, trapping or fishing by a person carrying a valid license issued to him pursuant to section 11-0713 of the environmental conservation law.

7. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle or shotgun, the propelling force of which is gunpowder by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, air force, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy, air force or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation; or (d) an agent of the department of

environmental conservation appointed to conduct courses in responsible hunting practices pursuant to article eleven of the environmental conservation law.

7-a. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person duly licensed to possess a pistol or revolver pursuant to section 400.00 or 400.01 of this chapter of a pistol or revolver duly so licensed to another person who is present at the time.

7-b. Possession and use, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by the national rifle association for the purpose of loading and firing the same, by a person who has applied for a license to possess a pistol or revolver and pre-license possession of same pursuant to section 400.00 or 400.01 of this chapter, who has not been previously denied a license, been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others, and who has been approved for possession and use herein in accordance with section 400.00 or 400.01 of this chapter; provided however, that such possession shall be of a pistol or revolver duly licensed to and shall be used under the

supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision and provided further that such possession and use be within the jurisdiction of the licensing officer with whom the person has made application therefor or within the jurisdiction of the superintendent of state police in the case of a retired sworn member of the division of state police who has made an application pursuant to section 400.01 of this chapter.

7-c. Possession for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may be either air, compressed gas or springs, by a person under sixteen years of age but not under twelve, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-d. Possession, at an indoor or outdoor shooting range for the purpose of loading and firing, of a rifle, pistol or shotgun, the propelling force of which may

be either air, compressed gas or springs, by a person under twelve years of age, under the immediate supervision, guidance and instruction of (a) a duly commissioned officer of the United States army, navy, marine corps or coast guard, or of the national guard of the state of New York; or (b) a duly qualified adult citizen of the United States who has been granted a certificate as an instructor in small arms practice issued by the United States army, navy or marine corps, or by the adjutant general of this state, or by the national rifle association of America, a not-for-profit corporation duly organized under the laws of this state; or (c) a parent, guardian, or a person over the age of eighteen designated in writing by such parent or guardian who shall have a certificate of qualification in responsible hunting, including safety, ethics, and landowner relations-hunter relations, issued or honored by the department of environmental conservation.

7-e. Possession and use of a pistol or revolver, at an indoor or outdoor pistol range located in or on premises owned or occupied by a duly incorporated organization organized for conservation purposes or to foster proficiency in small arms or at a target pistol shooting competition under the auspices of or approved by an association or organization described in paragraph 7-a of this subdivision for the purpose of loading and firing the same by a person at least fourteen years of age but under the age of twenty-one who has not been previously convicted of a felony or serious offense, and who does not appear to be, or pose a threat to be, a danger to himself or to others; provided however, that such possession shall be of a

pistol or revolver duly licensed to and shall be used under the immediate supervision, guidance and instruction of, a person specified in paragraph seven of this subdivision.

8. The manufacturer of machine-guns, assault weapons, large capacity ammunition feeding devices, disguised guns, pilum ballistic knives, switchblade or gravity knives, billies or blackjacks as merchandise and the disposal and shipment thereof direct to a regularly constituted or appointed state or municipal police department, sheriff, policeman or other peace officer, or to a state prison, penitentiary, workhouse, county jail or other institution for the detention of persons convicted or accused of crime or held as witnesses in criminal cases, or to the military service of this state or of the United States.

9. The regular and ordinary transport of firearms as merchandise, provided that the person transporting such firearms, where he knows or has reasonable means of ascertaining what he is transporting, notifies in writing the police commissioner, police chief or other law enforcement officer performing such functions at the place of delivery, of the name and address of the consignee and the place of delivery, and withholds delivery to the consignee for such reasonable period of time designated in writing by such police commissioner, police chief or other law enforcement officer as such official may deem necessary for investigation as to whether the consignee may lawfully receive and possess such firearms.

9-a. a. Except as provided in subdivision b hereof, the regular and ordinary transport of pistols or

revolvers by a manufacturer of firearms to whom a license as a dealer in firearms has been issued pursuant to section 400.00 of this chapter, or by an agent or employee of such manufacturer of firearms who is otherwise duly licensed to carry a pistol or revolver and who is duly authorized in writing by such manufacturer of firearms to transport pistols or revolvers on the date or dates specified, directly between places where the manufacturer of firearms regularly conducts business provided such pistols or revolvers are transported unloaded, in a locked opaque container. For purposes of this subdivision, places where the manufacturer of firearms regularly conducts business includes, but is not limited to places where the manufacturer of firearms regularly or customarily conducts development or design of pistols or revolvers, or regularly or customarily conducts tests on pistols or revolvers, or regularly or customarily participates in the exposition of firearms to the public.

b. The transportation of such pistols or revolvers into, out of or within the city of New York may be done only with the consent of the police commissioner of the city of New York. To obtain such consent, the manufacturer must notify the police commissioner in writing of the name and address of the transporting manufacturer, or agent or employee of the manufacturer who is authorized in writing by such manufacturer to transport pistols or revolvers, the number, make and model number of the firearms to be transported and the place where the manufacturer regularly conducts business within the city of New York and such other information as the commissioner may deem necessary. The

manufacturer must not transport such pistols and revolvers between the designated places of business for such reasonable period of time designated in writing by the police commissioner as such official may deem necessary for investigation and to give consent. The police commissioner may not unreasonably withhold his consent.

10. Engaging in the business of gunsmith or dealer in firearms by a person to whom a valid license therefor has been issued pursuant to section 400.00.

11. Possession of a firearm or large capacity ammunition feeding device by a police officer or sworn peace officer of another state while conducting official business within the state of New York.

12. Possession of a pistol or revolver by a person who is a member or coach of an accredited college or university target pistol team while transporting the pistol or revolver into or through New York state to participate in a collegiate, olympic or target pistol shooting competition under the auspices of or approved by the national rifle association, provided such pistol or revolver is unloaded and carried in a locked carrying case and the ammunition therefor is carried in a separate locked container.

13. Possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized competitive pistol match or league competition under auspices of, or approved by, the National Rifle Association and in which he is a competitor, within forty-eight hours of such event or by a person who is a non-resident of the state while attending or

traveling to or from an organized match sanctioned by the International Handgun Metallic Silhouette Association and in which he is a competitor, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the match program, match schedule or match registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this subdivision, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

13-a. Except in cities not wholly contained within a single county of the state, possession of pistols and revolvers by a person who is a nonresident of this state while attending or traveling to or from, an organized convention or exhibition for the display of or education about firearms, which is conducted

under auspices of, or approved by, the National Rifle Association and in which he is a registered participant, within forty-eight hours of such event, provided that he has not been previously convicted of a felony or a crime which, if committed in New York, would constitute a felony, and further provided that the pistols or revolvers are transported unloaded in a locked opaque container together with a copy of the convention or exhibition program, convention or exhibition schedule or convention or exhibition registration card. Such documentation shall constitute prima facie evidence of exemption, providing that such person also has in his possession a pistol license or firearms registration card issued in accordance with the laws of his place of residence. For purposes of this paragraph, a person licensed in a jurisdiction which does not authorize such license by a person who has been previously convicted of a felony shall be presumed to have no prior conviction. The superintendent of state police shall annually review the laws of jurisdictions within the United States and Canada with respect to the applicable requirements for licensing or registration of firearms and shall publish a list of those jurisdictions which prohibit possession of a firearm by a person previously convicted of a felony or crimes which if committed in New York state would constitute a felony.

14. Possession in accordance with the provisions of this paragraph of a self-defense spray device as defined herein for the protection of a person or property and use of such self-defense spray device under circumstances which would justify the use of

physical force pursuant to article thirty-five of this chapter.

(a) As used in this section "self-defense spray device" shall mean a pocket sized spray device which contains and releases a chemical or organic substance which is intended to produce temporary physical discomfort or disability through being vaporized or otherwise dispensed in the air or any like device containing tear gas, pepper or similar disabling agent.

(b) The exemption under this paragraph shall not apply to a person who:

(i) is less than eighteen years of age; or

(ii) has been previously convicted in this state of a felony or any assault; or

(iii) has been convicted of a crime outside the state of New York which if committed in New York would constitute a felony or any assault crime.

(c) The department of health, with the cooperation of the division of criminal justice services and the superintendent of state police, shall develop standards and promulgate regulations regarding the type of self-defense spray device which may lawfully be purchased, possessed and used pursuant to this paragraph. The regulations shall include a requirement that every self-defense spray device which may be lawfully purchased, possessed or used pursuant to this paragraph have a label which states: "WARNING: The use of this substance or device for any purpose other than self-defense is a criminal offense under the law. The contents are dangerous - use with care. This device shall not be

sold by anyone other than a licensed or authorized dealer. Possession of this device by any person under the age of eighteen or by anyone who has been convicted of a felony or assault is illegal. Violators may be prosecuted under the law."

15. Possession and sale of a self-defense spray device as defined in paragraph fourteen of this subdivision by a dealer in firearms licensed pursuant to section 400.00 of this chapter, a pharmacist licensed pursuant to article one hundred thirty-seven of the education law or by such other vendor as may be authorized and approved by the superintendent of state police.

(a) Every self-defense spray device shall be accompanied by an insert or inserts which include directions for use, first aid information, safety and storage information and which shall also contain a toll free telephone number for the purpose of allowing any purchaser to call and receive additional information regarding the availability of local courses in self-defense training and safety in the use of a self-defense spray device.

(b) Before delivering a self-defense spray device to any person, the licensed or authorized dealer shall require proof of age and a sworn statement on a form approved by the superintendent of state police that such person has not been convicted of a felony or any crime involving an assault. Such forms shall be forwarded to the division of state police at such intervals as directed by the superintendent of state police. Absent any such direction the forms shall be maintained on the premises of the vendor and shall be open at all reasonable hours for inspection by any

peace officer or police officer, acting pursuant to his or her special duties. No more than two self-defense spray devices may be sold at any one time to a single purchaser.

16. The terms "rifle," "shotgun," "pistol," "revolver," and "firearm" as used in paragraphs three, four, five, seven, seven-a, seven-b, nine, nine-a, ten, twelve, thirteen and thirteen-a of this subdivision shall not include a disguised gun or an assault weapon.

b. Section 265.01 shall not apply to possession of that type of billy commonly known as a "police baton" which is twenty-four to twenty-six inches in length and no more than one and one-quarter inches in thickness by members of an auxiliary police force of a city with a population in excess of one million persons or the county of Suffolk when duly authorized by regulation or order issued by the police commissioner of such city or such county respectively. Such regulations shall require training in the use of the police baton including but not limited to the defensive use of the baton and instruction in the legal use of deadly physical force pursuant to article thirty-five of this chapter. Notwithstanding the provisions of this section or any other provision of law, possession of such baton shall not be authorized when used intentionally to strike another person except in those situations when the use of deadly physical force is authorized by such article thirty-five.

[c. *Redesignated b.*]

c. Sections 265.01, 265.10 and 265.15 shall not apply to possession of billies or blackjacks by persons:

1. while employed in fulfilling contracts with New York state, its agencies or political subdivisions for the purchase of billies or blackjacks; or

2. while employed in fulfilling contracts with sister states, their agencies or political subdivisions for the purchase of billies or blackjacks; or

3. while employed in fulfilling contracts with foreign countries, their agencies or political subdivisions for the purchase of billies or blackjacks as permitted under federal law.

d. Subdivision one of section 265.01 and subdivision four of section 265.15 of this article shall not apply to possession or ownership of automatic knives by any cutlery and knife museum established pursuant to section two hundred sixteen-c of the education law or by any director, officer, employee, or agent thereof when he or she is in possession of an automatic knife and acting in furtherance of the business of such museum.

OPPOSITION BRIEF

Supreme Court, U.S.
FILED
AUG 2 8 2009
OFFICE OF THE CLERK

No. 08-1592

In the
Supreme Court of the United States

James M. Maloney,

Petitioner,

-against-

Kathleen A. Rice,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

LORNA B. GOODMAN
Nassau County Attorney
Attorney for Respondent
Kathleen A. Rice
One West Street
Mineola, New York 11501
(516) 571-3954

LORNA B. GOODMAN,
Counsel of Record.

LISA B. ROSS,
PAUL L. HERZFELD,
DENNIS J. SAFFRAN
of Counsel.

QUESTION PRESENTED

Whether the Court should grant certiorari to decide whether the Second Amendment applies to the states when the answer would be irrelevant in this case because the nunchaku, the weapon at issue, is a dangerous and unusual weapon not protected by the Second Amendment.

PARTIES TO THE PROCEEDING

The petition caption accurately identifies the parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	iv
STATEMENT OF THE CASE	1
THE PETITION SHOULD BE DENIED	5
I. THERE IS NO CURRENT CIRCUIT SPLIT	5
II. THE RESULT OF THIS CASE WOULD REMAIN THE SAME REGARDLESS OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES BECAUSE THE SECOND AMENDMENT DOES NOT PROTECT NUNCHAKU, WHICH ARE DANGEROUS AND UNUSUAL WEAPONS.	8
A. The nunchaku is dangerous	10
B. The nunchaku is not "in common use" and is therefore not protected by the Second Amendment.	11
CONCLUSION	17

TABLE OF CITED AUTHORITIES

Page

Cases:

District of Columbia v. Heller,
128 S. Ct. 2783 (2008) ..... *passim*

Forrester v. City of San Diego,
25 F.3d 804 (9th Cir. 1994) 14

Maloney v. County of Nassau,
2007 U.S. Dist. LEXIS 71162
(E.D.N.Y. Sept. 24, 2007) 2, 6

National Rifle Ass'n v. City of Chicago,
567 F.3d 856 (7th Cir. 2009) 6, 7, 8

Nordyke v. King,
563 F.3d 439 (9th Cir. 2009) 5, 7, 15

Presser v. Illinois,
116 U.S. 252 (1866) 4

U.S. v. Tagg,
2009 U.S. App. LEXIS 14139
(11th Cir. June 30, 2009) 9

United States v. Fincher,
538 F.3d 868 (8th Cir. 2008) 9

Cited Authorities

Page

United States v. Miller,
307 U.S. 174 (1939) 9, 15

United States v. Perkins,
2008 U.S. Dist. LEXIS 72892
(D. Neb. Sept. 12, 2008) 10

United States Constitution:

First Amendment 3

Second Amendment ..... *passim*

Ninth Amendment 3

Fourteenth Amendment 3, 8

Statutes:

Ariz. Rev. Stat. § 13-3101 (LexisNexis 2008) ... 11

Cal. Penal Code §§ 12020, 12029 (Deering 2009)
..... 10

Conn. Gen. Stat. § 53-206 (2008) 10-11

Mass. Ann. Laws ch. 269, § 10(b) (LexisNexis
2009) 11

New York Penal Law §§ 265.00 through 265.02
..... 3

Cited Authorities

Page

New York Penal Law § 265.01 ..... 2, 13

New York Penal Law § 265.20(a)(1) 13

Rules:

Federal Rule of Appellate Procedure 43(c)(2) .. 3

Federal Rule of Civil Procedure 25(d) 3

Other:

Carl Brown, *The Law and Martial Arts* 148 (1998) 2, 10

Paul Crompton, *The Complete Martial Arts* 62 (1989) 1-2

William LaRue, *Police Fight Spread of Exotic Weapons*, The Post Standard (Syracuse, NY), July 13, 1987 ..... 2, 12

Jennifer Lawler, *Martial Arts for Dummies* 16 (2003) 12

Letter of Michael Juliver, Association of the Bar of the City of New York, April 11, 1974, Bill Jacket, L. 1974, ch. 179 11

Cited Authorities

Page

Alex Levitas, *Ancient Weapons for Modern Police*, 9 Journal of Asian Martial Arts 35 (2000) 10

Memorandum of Louis J. Lefkowitz, Attorney General, State of New York, April 8, 1974, Bill Jacket, L. 1974, ch. 179 11

Peter Lewis, *Martial Arts* 117 (1987) 10

Michael D. Mitchell, Note, *Forrester v. City Of San Diego: Is Pain Compliance an Appropriate Police Practice under the Fourth Amendment?*, 40 Vill. L. Rev. 1177 (1995) ... 14

1980 N.Y. Op. (Inf.) Att'y Gen. 247 13

Tony Perry, *Police Use of Martial Arts Weapon Debated*, Los Angeles Times, May 8, 2000 ... 14

Police Conference of New York, Memorandum in Support, Bill Jacket, L. 1974, ch. 179 ..... 2, 10

Richard Serrano, *A Question of Restraint – Amid Brutality Allegations, Police in San Diego are Using an Ancient Asian Tool as Weapon in Subduing Suspects*, Los Angeles Times, Jan. 8, 1990 14

Cited Authorities

Page

Tracy Wilkinson, *29 Anti-Abortion Protestors Sue Police for Alleged Brutality: Demonstrators Say They Were Injured by 'Pain Compliance' Techniques when Officers Broke up Blockades at Family Planning Clinics*, Los Angeles Times, Feb. 10, 1990 12

World Nunchaku Association, *History – Bruce Lee*, available at http://www.nunchaku-do.org/index.php?option=com_content&task=view&id=49&Itemid=77 11

No 08-1592

In the
Supreme Court of the United States

James M. Maloney,

Petitioner,

-against-

Kathleen A. Rice,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This case involves a challenge to New York State's prohibition on the possession of nunchaku,[1] a Japanese martial arts weapon consisting of two pieces of wood or other rigid material (sticks) connected by a chain or cord. Nunchaku are distinguished by their ability to "deliver a powerful blow without its impact being felt by the user, since the cord cuts off the force from his hand without diminishing it." Paul Crompton, The Complete

[1] Nunchaku are also known as "nunchucks" and "chuka sticks."

Martial Arts 62 (1989). The nunchaku is an extraordinarily powerful weapon; a nunchaku strike can generate 1600 pounds of pressure – while a human bone will break under only 8 pounds of pressure. Police Conference of New York, Memorandum in Support, Bill Jacket, L. 1974, ch. 179, at 14. Quite simply, the nunchaku can be snapped hard enough to "open a hole in someone's skull." Police Fight Spread of Exotic Weapons, The Post Standard (Syracuse, NY), July 13, 1987, at A5. See also Carl Brown, The Law and Martial Arts 148 (1998) ("Nunchaku can explode coconuts like grenades, crack bones, and strangle. It is considered a deadly weapon by almost all jurisdictions.")

This action arose from an incident that took place on August 23, 2000, when a telephone employee working outside Petitioner's residence called the police, claiming that Petitioner had threatened him with a rifle. Maloney v. County of Nassau, 2007 U.S. Dist. LEXIS 71162 at *2-3 (E.D.N.Y. Sept. 24, 2007). Police arrived at the residence, but Petitioner refused to open the door or leave the house, and a twelve-hour standoff ensued. Id. Finally, at around 2 a.m., Petitioner surrendered to police, who subsequently entered the residence and seized various items. Id. They arrested Petitioner and sent him to a mental hospital, where he spent the night. Id. at *4.

Petitioner was charged with several crimes, including possession of a nunchaku in violation of New York Penal Law § 265.01, but later entered into an agreement under which he pleaded guilty to one charge of disorderly conduct. Pet. App. 36a-37a. The agreement also provided for the destruction of the nunchaku and a fine in the amount of $ 310. Id.

Petitioner commenced this action on February 18, 2003 in the Eastern District of New York, asking the court to declare unconstitutional the portions of New York Penal Law §§ 265.00 through 265.02 which criminalize the possession of nunchaku. Pet. App. 71a. The original named defendants were the New York State Attorney General and the Nassau County District Attorney. Petitioner later voluntarily discontinued the action against the District Attorney, leaving the Attorney General the only named defendant. The district court then ruled that Petitioner did not have standing to sue the Attorney General, who was not responsible for enforcing the law. Pet. App. 39a. The court granted leave to amend the complaint, and Petitioner again named as a defendant the Nassau County District Attorney, the entity responsible for enforcement of the statute, as well as the Governor and Attorney General of the State.[2] Pet. App. 45a. The complaint alleged that the Penal Law provisions violated rights guaranteed by the First and Second Amendments, as well as various unenumerated rights, including those protected by the Ninth and Fourteenth Amendments.

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[2] This amended complaint named Eliot Spitzer, in his official capacity as Attorney General of the State of New York, George Pataki, in his official capacity as Governor of the State of New York, and Denis Dillon, in his official capacity as District Attorney of the County of Nassau. Pet. App. 45a. In later proceedings, the then-current holder of each office was automatically substituted pursuant to Federal Rule of Appellate Procedure 43(c)(2) or Federal Rule of Civil Procedure 25(d). Pet. App. 1a, 19a-20a. Relevant here is the substitution of current Nassau County District Attorney Kathleen A. Rice for former District Attorney Denis Dillon.

The district court dismissed the amended complaint on January 17, 2007, finding that the Attorney General and Governor were not proper defendants, Pet. App. 24a, and granting to the District Attorney judgment on the pleadings for all claims of constitutional violations. Relevant here is the district court's holding that "[t]he Second Amendment imposes no limitation on New York State's ability to ban the possession of certain weapons, including the nunchaku," because the Second Amendment applies only to the federal government. Pet. App. 31a. Petitioner then requested that the court reconsider its decision, but the court rejected his request on May 14, 2007. Pet. App. 13a.

On June 26, 2008, this Court issued its opinion in District of Columbia v. Heller, 128 S. Ct. 2783 (2008), holding that the Second Amendment protected an individual right to bear arms unconnected with militia service. The Court, however, made clear that the Second Amendment did not protect *all* arms; only those arms "in common use" and "typically possessed by law-abiding citizens for lawful purposes" were protected. Id. at 2816-17.

Following the Heller decision, the Second Circuit affirmed the district court judgment, explaining that it must follow the rule set forth in Presser v. Illinois, 116 U.S. 252, 265 (1866), which held that the Second Amendment limits only the federal government. The Second Circuit therefore found that New York's prohibition on nunchaku did not violate the Second Amendment. Pet. App. 2a-7a.

THE PETITION SHOULD BE DENIED

Petitioner argues that the Court should consider this case in order to resolve an alleged split of opinion among the courts of appeals over the question of whether the Second Amendment applies to the States. There is, however, presently no circuit split. (Part I, infra.) Furthermore, even if the Court wished to address the question now, it should not use this case to do so, because the resolution of this case would remain the same regardless of whether the Second Amendment applies to the states. This is because the Second Amendment does not protect nunchaku, which are "dangerous and unusual weapons" not "in common use" or "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816-17 (2008). (Part II, infra.)

I. THERE IS NO CURRENT CIRCUIT SPLIT

Petitioner argues that the Court should grant certiorari because the Second Circuit's holding that the states are not bound by the Second Amendment is in conflict with the Ninth Circuit's decision in Nordyke v. King, 563 F.3d 439 (9th Cir. 2009), which found that the Second Amendment was incorporated against the states through the Due Process Clause of the Fourteenth Amendment. The Ninth Circuit, however, has ordered that Nordyke be reheard en banc, and that the three-judge panel opinion is not to be cited as precedent. Nordyke v. King, No. 07-15763 (July 29, 2009 order) (available at http://www.

ca9.uscourts.gov/datastore/opinions/2009/07/29/0715763ebo.pdf.).

The Seventh Circuit is the only other circuit court to consider this question post-Heller, and it followed the Second Circuit's decision in this case. See National Rifle Ass'n of Am., Inc. v. City of Chicago, 567 F.3d 856 (7th Cir. 2009). Petitioner attempts to cast this decision as the third prong in a "three-circuit split," Pet. 19, because the Seventh Circuit included in its opinion reasoning about why incorporation would be inappropriate even if the Court had the power to reach the question. But the Seventh Circuit's essential holding is identical to that of the Second Circuit: A circuit court must follow Supreme Court precedent holding that the Second Amendment does not apply to the states, even if the rationale underlying that precedent has been undermined by later cases. National Rife Ass'n, 567 F.3d at 857 ("We agree with Maloney"). There is therefore currently no division of opinion among the circuits.

The Second and Seventh Circuit opinions do recognize that only the Supreme Court can revisit the question of whether the Second Amendment applies to the states. Should the Court wish to resolve that question, however, it should not use this case to do so. Petitioner argues to the contrary, claiming that if one of the three circuit cases were to be selected, "this case should be the main vehicle," because the New York statute prohibits the mere possession of the nunchaku.[3] Pet. 25. Petitioner fails to note that

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[3] Petitioner appears to find some significance in the fact that he challenges only the ban on possession of nunchaku in the home,

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both the Seventh and Ninth Circuit decisions involved challenges to statutes that prohibited the mere possession of arms. Nordyke, 563 F.3d at 443 ("The Ordinance makes it a misdemeanor to bring onto *or to possess* a firearm or ammunition on County property.") (emphasis added); National Rifle Ass'n, 567 F.3d at 857 ("Two municipalities in Illinois ban the *possession* of most handguns.") (emphasis added). Moreover, the Seventh Circuit case considered laws that banned possession in any location, including in the home.

Since all the laws in question prohibit mere possession, the prohibition on possession cannot be what distinguishes these cases from each other. The true distinguishing factor is that this case involves nunchaku – a weapon which, as explained below, would not be protected by the Second Amendment. Should the Court wish to resolve the question even in the absence of a circuit split, it would be more logical to use the Seventh Circuit case as a vehicle, since that decision involved a challenge to a prohibition on the possession of handguns – the weapon specifically found by the Supreme Court to be protected by the Second Amendment as the weapon "overwhelmingly chosen by American society" for the purpose of self-defense. Heller, 128 S. Ct. at 2817. The nunchaku – a weapon barely known to many Americans and strongly associated

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while the complaints in the Seventh Circuit cases also included challenges to provisions prohibiting carrying of handguns and requiring registration of firearms. Pet. 26. The fact remains, however, that all three cases challenge statutes which prohibit the mere possession of arms.

with criminal uses, see infra p. 11 – presents a startlingly different case.[4]

II. THE RESULT OF THIS CASE WOULD REMAIN THE SAME REGARDLESS OF WHETHER THE SECOND AMENDMENT APPLIES TO THE STATES BECAUSE THE SECOND AMENDMENT DOES NOT PROTECT NUNCHAKU, WHICH ARE DANGEROUS AND UNUSUAL WEAPONS.

This case is an inappropriate vehicle through which to address the question of whether the Second Amendment applies to the states because nunchaku are not protected by the Second Amendment.

The Court's opinion in Heller made it clear that "the Second Amendment right, whatever its nature, extends only to certain types of weapons." 128 S. Ct. at 2814. The Court read earlier precedent to stand for the proposition that the Second Amendment confers a right to bear only those arms that "have some reasonable relationship to the preservation or efficiency of a well regulated militia." Id. (quoting

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[4] It should also be noted that Respondent joins in the arguments made by the City of Chicago and the Village of Oak Park in their brief in opposition to the petition for a writ of certiorari in National Rifle Ass'n, supra. That brief argues that the Second Amendment should not be incorporated against the States under the Due Process Clause of the Fourteenth Amendment because "[t]he right recognized in Heller to keep and bear arms in common use is not implicit in the concept of ordered liberty," Nat'l Rifle Ass'n Br. in Opp. 11, and that the Supreme Court should not revisit its repeated holdings that the Privileges or Immunities Clause of the Fourteenth Amendment does not impose the Bill of Rights against the states.

United States v. Miller, 307 U.S. 174, 178 (1939)). In colonial times, the Court explained, militia were formed by groups of men who brought with them their own weapons – the ordinary arms commonly used for lawful purposes such as self-defense. Id. at 2815.

From this history and its reading of precedent, the Heller Court drew the rule that "the Second Amendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." Id. at 2816. The only weapons protected are those "in common use at the time."[5] Id. at 2817 (quoting Miller, 307 U.S. at 179). This limitation "is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" Id. (internal citations omitted).[6] Nunchaku

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[5] The Heller court did not specifically state whether the rule protecting weapons "in common use at the time" refers to the time of the adoption of the Second Amendment, or the current time. It appears, however, from the remainder of the Heller opinion, that the Court intended the rule to refer to the current time. The Court justified its holding that handguns were protected by the Second Amendment by noting that "handguns are the most popular weapon chosen by Americans for self-defense in the home." 128 S. Ct. at 2818. It looked to the weapon's popularity in the present time, not at the time of the Second Amendment's adoption. The Court also explicitly rejected the argument that "only those arms in existence in the 18th century are protected by the Second Amendment," stating that the argument "border[ed] on the frivolous." Id. at 2791.

[6] Several lower courts have followed the Court's clear guidance here, and found that various weapons are unprotected by the Second Amendment. See, e.g., U.S. v. Tagg, 2009 U.S. App. LEXIS 14139 (11th Cir June 30, 2009) (pipe bombs not protected by the Second Amendment); United States v. Fincher, 538 F.3d 868, 874 (8th Cir. 2008) ("Machine guns are not in common use

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are not "in common use" and are "not typically possessed by law-abiding citizens for lawful purposes." Instead, they are dangerous and unusual weapons.

A. The nunchaku is dangerous

There is no question that the nunchaku is dangerous. "[T]he power of a nunchaku strike easily shatters bones; and in the hands of an unskilled person this weapon is about as dangerous to its wielder as it is to the opponent." Alex Levitas, Ancient Weapons for Modern Police, 9 Journal of Asian Martial Arts 35, 42 (2000). Nunchaku give "even a weak assailant enough leverage to throttle his foe. . . . With a deceptively easy motion, a nunchaku wielder can bash or strangle his victim." Memorandum in Support, Police Conference of New York, Bill Jacket, L. 1974, ch. 179 at 14. See also Peter Lewis, Martial Arts 117 (1987) ("[T]he nunchaku is an extremely dangerous weapon"); Carl Brown, The Law and Martial Arts 148 (1998) ("It seems obvious to we martial artists that the nunchaku is a deadly weapon. . . . [T]he dreaded nunchaku is a garrote from hell.")

Several states, including New York, have responded to this danger by banning or severely restricting the nunchaku.[7] This was not, as Petitioner

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by law-abiding citizens for lawful purposes and therefore fall within the category of dangerous and unusual weapons that the government can prohibit for individual use."); United States v. Perkins, 2008 U.S. Dist. LEXIS 72892 (D. Neb. Sept. 12, 2008) (finding that silencers and suppressors may be prohibited because they are not in common use for lawful purposes).

[7] Other states that currently ban or severely restrict the nunchaku include California, see Cal. Penal Code §§ 12020, 12029 (Deering 2009); Connecticut, see Conn. Gen. Stat. § 53-206

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claims, "an overblown reaction to a popular martial-arts fantasy film." Pet. 28. It was, instead, a reaction to the growing criminal use of the weapon – which criminal use was perhaps instigated by the film. See World Nunchaku Association, History – Bruce Lee, available at http://www.nunchaku-do.org/index.php?option=com_content&task=view&id=49&Itemid=77 (noting that, in the years following the release of Bruce Lee films, "the nunchaku was regularly used in street fights . . . The public opinion grew that the nunchaku was a criminal weapon, primarily used for strangling."); Memorandum of Louis J. Lefkowitz, Attorney General, State of New York, April 8, 1974, Bill Jacket, L. 1974, ch. 179 at 13 (the nunchaku "has apparently been widely used by muggers and street gangs and has been the cause of many serious injuries."); Letter of Michael Juliver, Association of the Bar of the City of New York, April 11, 1974, Bill Jacket, L. 1974, ch. 179 at 11 ("There is growing evidence that chuka sticks [i.e. nunchaku] are used in robberies and assaults.")

B. The nunchaku is not "in common use" and is therefore not protected by the Second Amendment.

The key to the constitutional analysis is whether the arms in question are "in common use" and are "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816, 2817. The nunchaku is an unusual weapon; it is not the type of weapon in common use or typically possessed for lawful purposes. Martial arts books directed to ordi-

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(2008); Arizona, see Ariz. Rev. Stat. § 13-3101 (LexisNexis 2008); and Massachusetts, see Mass. Ann. Laws ch. 269, § 10(b) (LexisNexis 2009).

nary United States citizens describe the nunchaku as "unusual, to say the least,"[8] and news articles about the weapon often explain or describe the nunchaku, operating on the assumption that many ordinary readers will not be familiar with it.[9] This makes nunchaku quite different from the handguns protected by the Second Amendment – it is hard to imagine a news article about handguns that begins by explaining what a handgun is. Petitioner even appears to assume that the members of this Court will not be familiar with nunchaku, as he begins his statement of the case with a description of the weapon. Pet. 6.[10]

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[8] Jennifer Lawler, Martial Arts for Dummies 16 (2003) (stating that "Japanese martial arts weapons are unusual, to say the least," and giving nunchaku as the first example of such an unusual weapon).

[9] See, e.g., Tracy Wilkinson, 29 Anti-Abortion Protestors Sue Police for Alleged Brutality: Demonstrators Say They Were Injured by 'Pain Compliance' Techniques when Officers Broke up Blockades at Family Planning Clinics, Los Angeles Times, Feb. 10, 1990 at 3 ("The most serious injuries, the suit alleges, came from the so-called nunchaku, a martial arts device consisting of two sticks connected by a rope."); William LaRue, Police Fight Spread of Exotic Weapons, The Post Standard (Syracuse, NY), July 13, 1987 at A5 ("Chuka sticks are two long pieces of wood linked by rope or chain, and they inflict injury by striking or choking.").

[10] Petitioner's "Questions Presented" section – the very beginning of the Petition – begins by stating that "[a] New York statute makes the possession of a type of weapon known as a nunchaku a criminal misdemeanor." The substitution of the word "handgun" makes the sentence sound a bit ridiculous: "A New York statute makes the possession of *a type of weapon known as a handgun* a criminal misdemeanor." This demonstrates the vast difference between nunchaku and handguns – clearly,

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The fact that some individuals use the nunchaku in a nonviolent manner in marital arts classes does not transform this unusual weapon into one "typically possessed by law-abiding citizens." Heller, 128 S. Ct. at 2816. Only those weapons "in common use" fall within the Second Amendment's protection, and the nunchaku simply cannot come near that threshold. Many people do not even know what a nunchaku *is* – and many of those familiar with the weapon associate it with criminal contexts rather than lawful purposes. See supra p. 11.

In response, Petitioner might point to his statement that the nunchaku is "currently used by over two hundred police forces across the country." Pet. 7. But the fact that a weapon is authorized for police use[11] does not mean that it is "in common use" by law-abiding citizens or is typically possessed by ordi-

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handguns are a weapon "in common use," while nunchaku are not.

[11] New York Penal Law § 265.20 (a)(1) contains several exceptions to the prohibition on possession of the various weapons listed in Penal Law § 265.01, including an exception for possession by police officers. In discussing whether police use of the weapon is legal in New York, Petitioner claims that "none of the defined exemptions apply to 'chuka sticks.'" Pet. 6. This is inaccurate; the exemptions in New York Penal Law § 265.20(a)(1) apply to "[p]ossession of *any* of the weapons . . specified in sections 265.01," (emphasis added), which, of course, would include chuka sticks. The statute therefore explicitly permits possession by police officers. Petitioner correctly notes that the New York State Attorney General has opined that police officers may possess the weapons prohibited by section 265.01, but the Attorney General's opinion merely applied the clear statute. It did not create a new interpretation. See 1980 N.Y. Op. (Inf.) Att'y Gen. 247.

nary individuals in their homes for self-defense. In addition, there are 17,000 police departments in the United States, so if two hundred of these are using nunchaku, only about *one percent* of United States police departments are using this unusual weapon.[12] The nunchaku is therefore not even "in common use" for police departments.[13]

Petitioner further claims that nunchaku fall within the protection of the Second Amendment[14] be-

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[12] See Tony Perry, Police Use of Martial Arts Weapon Debated, Los Angeles Times, May 8, 2000 at 3. ("Of about 17,000 police departments in the United States, about 200 small and medium-size departments continue to use nunchakus . . .")

[13] Furthermore, the limited police use of the weapon has been plagued by controversy and claims of police brutality. See, e.g., Perry, supra note 12, at 3 (Los Angeles Police Department abandoned use of nunchaku as a result of controversy and a lawsuit prompted by "[n]ews pictures of pain-wracked protesters being led away by Los Angeles police"). Police use generally involves twisting the cord around the limb of an individual being arrested, which results in excruciating pain. See Michael D. Mitchell, Note, Forrester v. City Of San Diego: Is Pain Compliance an Appropriate Police Practice under the Fourth Amendment?, 40 Vill. L. Rev. 1177, 1178 n.9 (1995). In one lawsuit claiming unconstitutional excessive force due to the use of nunchaku on nonviolent protesters, a video showed images of "small, middle aged women scream[ing] in agony as the nonchakus [sic] were twisted around their wrists." Forrester v. City of San Diego, 25 F.3d 804, 813-815 (9th Cir. 1994) (Kleinfeld, J., dissenting) (also noting that "[t]he pain caused lasting damage, from tendon injuries to breaking a surgeon's wrist."). Those subject to police use of the nunchaku have described the excruciating pain as "street torture." Richard Serrano, A Question of Restraint – Amid Brutality Allegations, Police in San Diego are Using an Ancient Asian Tool as Weapon in Subduing Suspects, Los Angeles Times, Jan. 8, 1990 at 1.

[14] Petitioner argues that the fact that this case concerns nun-

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cause they meet the definition of arms as stated by this Court. Pet. 27. Insofar as Petitioner's argument is that any weapon that meets the definition of "arms" is protected by the Second Amendment, he ignores the Heller Court's clear statement that the Second Amendment does not protect all arms; the right extends only to "arms that 'have some reasonable relationship to the preservation or efficiency of a well regulated militia.'" 128 S. Ct. at 2814 (quoting United States v. Miller, 307 U.S. 174, 178 (1939)). As noted above, the Court ruled that the only arms with this relationship to the militia are those "in common use."

Petitioner further claims that nunchaku are protected by the Second Amendment because "the destructive power of all forms of blunt club-like weapons [like the nunchaku] is far less than that of the handguns . . . held protected in Heller." Pet. 27. But the test clearly articulated by the Heller Court did not take into account the "destructive power" of the weapon in question. The test for Second Amendment protection instead asks whether a weapon is

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chaku is "legally irrelevant" because "none of the circuits . . . reached the question of whether the underlying arms were protected." Pet. 27. This is specious reasoning. The Second and Seventh Circuits did not reach this issue because they dismissed the case on the threshold question of whether the Second Amendment applied to the states at all. Had they gone beyond this threshold question, they would of course have had to confront the question of whether the underlying arms were protected. Furthermore, the Ninth Circuit panel in Nordyke, after holding that the Second Amendment was applicable to the states, *did* necessarily reach the question of whether the underlying arms were protected in the context there – i.e., in "sensitive places" such as County property.

"in common use" and is "typically possessed by law-abiding citizens for lawful purposes." Heller, 128 S. Ct. at 2816. The nunchaku, a highly dangerous and unusual weapon, cannot meet this requirement.

Because nunchaku are not protected by the Second Amendment, it is irrelevant to the determination of this case whether that Amendment applies to the States. The result of the case would be the same, and the judgment below would stand, no matter how this Court were to decide on the incorporation question. New York State would still have the power to ban nunchaku. This case is therefore not an appropriate vehicle through which to decide whether the Second Amendment applies to the states.

CONCLUSION

The petition for a writ of certiorari should be denied.

LORNA B. GOODMAN
Nassau County Attorney
Attorney for Respondent
Kathleen A. Rice
One West Street
Mineola, New York 11501
(516) 571-3954

LORNA B. GOODMAN,
Counsel of Record,

LISA B. ROSS,
PAUL L. HERZFELD,
DENNIS J. SAFFRAN,
of Counsel

REPLY BRIEF

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JAMES M. MALONEY,

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v.

KATHLEEN A. RICE,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR THE PETITIONER

Of Counsel

JAMES M. MALONEY
33 Bayview Avenue
Port Washington, NY 11050
(516) 767-1395

JEFFREY BOSSERT CLARK
Counsel of Record
WILLIAM E. BESTANI
KATHARINE M. BURKE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
202-879-5000

Counsel for Petitioner James M. Maloney

September 9, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

A. The County Does Not Assail the Core Contentions of the Petition. 3

B. The County's Un-Adjudicated Claim That Nunchaku Are "Dangerous and Unusual" Provides No Basis for Denying Certiorari. 6

CONCLUSION 13

TABLE OF AUTHORITIES

Page(s)

CASES

Bell Atlantic Corp. v. Twombly,
550 U.S. 544 (2007) 2

Chambers v. United States,
129 S. Ct. 687 (2009) 12

District of Columbia v. Heller,
128 S. Ct. 2783 (2008) 1, 2-3, 5, 6, 9, 10-11, 12

FCC v. Fox Television Stations, Inc.,
129 S. Ct. 1800 (2009) 1

Miller v. Texas,
153 U.S. 535 (1894) 3-4

National Rifle Ass'n of Am., Inc. v. City of Chicago,
567 F.3d 856 (7th Cir. 2009) 4, 5-6

Nordyke v. King,
563 F.3d 439 (9th Cir. 2009) 3-4

Perry v. Thomas,
482 U.S. 483 (1987) 1

Presser v. Illinois,
116 U.S. 252 (1886) 3-4

Rodriguez de Quijas v. Shearson/American Expr., Inc.,
490 U.S. 477 (1989) 3-4

Slaughter-House Cases,
83 U.S. (16 Wall.) 36 (1872) 4-5

United States v. Cruikshank,
92 U.S. 542 (1876) 3-4

TABLE OF AUTHORITIES (Cont.)

Page(s)

United States v. Morrison,
529 U.S. 598 (2000) 9

CONSTITUTIONAL PROVISIONS

U.S. Const., amend. II 1-6, 10

U.S. Const., amend. XIV 4-5

RULE

Sup. Ct. R. 15.2 5

SECONDARY SOURCES

AMAZON.COM 11-12

David B. Adams, *Wound Ballistics*,
147 MILITARY MEDICINE 831 (1982) 10

CLAUDE BLAIR, EUROPEAN AND AMERICAN ARMS
C. 1100-1850 (1962) 13

CENTERS FOR DISEASE CONTROL,
WEB-BASED INJURY STATISTICS QUERY AND
REPORTING SYSTEM (WISQARS)
http://www.cdc.gov/injury/wisqars/ 8

FEDERAL BUREAU OF INVESTIGATION,
CRIME IN THE UNITED STATES (2007),
http://www.fbi.gov/ucr/cius2007/ 6-8

TABLE OF AUTHORITIES (Cont.)

Page(s)

Curt Franklin,
How Golf Clubs Work, at
http://www.howstuffworks.com/
golf-club.htm/printable 9-10

THE FEDERALIST No. 29
(Alexander Hamilton) 5

DARRELL HUFF, HOW TO LIE
WITH STATISTICS (1954) 9

SHOPPING.COM 11-12

WORLD NUNCHAKU ASSOCIATION,
http://www.nunchaku.org/ 11

Nassau County offers scant reason to deny the Petition. The County does not contest the importance of the questions presented. Instead, it focuses on the claim that certiorari should be denied because even if this Court were to hold that the Second Amendment applies against the States, the County would prevail below on its wholly un-adjudicated defense that nunchaku are "dangerous and unusual," *District of Columbia v. Heller*, 128 S.Ct. 2783, 2817 (2008), and hence not constitutionally protected "arms." But the Second Circuit did not rule on that issue. This case went off at the motion-to-dismiss stage, cutting short Petitioner's opportunity to contest the County's factual claims about the alleged dangers of nunchaku.

The County well knows that a prediction it will win on an un-adjudicated defense that the Petitioner had no opportunity to address is no reason to deny certiorari. The County cites no authority for its claim, since all authority is to the contrary. *See, e.g., Perry v. Thomas*, 482 U.S. 483, 492 (1987) ("This issue may be resolved on remand; its status as an alternative ground for denying arbitration does not prevent us from reviewing the ground exclusively relied upon by the courts below."); *FCC v. Fox Television Stations*, 129 S. Ct. 1800, 1819 (2009) ("This Court . . . is one of final review, not of first view.") (internal quotation marks omitted). Indeed, the County invited the Second Circuit to rule on that defense, but the Second Circuit declined. The County acknowledges this, but responds only with rhetoric. Opp. 14-15 n.14 ("specious" to point out the scope of the Second Circuit's decision).

The County's attempt to demonize nunchaku, through a hodgepodge of ominous-sounding quips, is a cynical attempt to convince the Court that this case is not the right vehicle to resolve the pressing questions of Second Amendment incorporation. The County apparently hopes that dark language and the foreign-sounding name, "nunchaku," will convince the Court that no ordinary citizen would ever touch such a weapon. That approach inherently concedes the worthiness of the Petition and difficulty of denying its logic.

Petitioner had no opportunity below to develop a record showing the reality that nunchaku are: (i) frequently used for lawful defensive and recreational purposes; (ii) not unusual in a country where countless thousands peaceably practice martial arts; (iii) far safer than the handguns *Heller* held are protected; and (iv) highly useful in non-lethally disarming or subduing assailants. These facts, as alleged in Petitioner's complaint, 48a-54a (¶¶ 14-18, 23-27, 33, 35, 37-39), must be taken as true. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Mr. Maloney was put out of court solely because the Second Amendment was held not to apply against the States. 3a-5a. Given the Court's decision in *Heller* that the Second Amendment is an individual right of great import in protecting the liberties of a free nation, 128 S.Ct. at 2821 (the Second Amendment "surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"), Mr. Maloney cannot be denied the right to press his case here because of the County's unripe and untested factual assertions. *Id.* ("[T]here will be time enough to expound upon the historical

justifications for the exceptions we have mentioned if and when those exceptions come before us.").

A. The County Does Not Assail the Core Contentions of the Petition.

1. The County does not contest the Petition's statement of facts or procedural history. Pet. 9-14. The County notes that after the events at Mr. Maloney's home in 2000, authorities had him spend the night at a mental hospital. Opp. 2. But that only underscores the County's abuse of authority: Nassau County apparently considers a citizen who stands on his rights to refuse a warrantless police entry into his home to be lacking full possession of his faculties. Mr. Maloney's practice of law in good standing and his status as an officer in the Naval Reserve belie the County's baseless and irrelevant attempts to cast aspersions on his character.

2. The County highlights that the Ninth Circuit recently granted *en banc* review in *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), vacating the panel decision and retracting the circuit split. Opp. 5-8. But the County ignores that the Petition anticipated this possibility. Pet. 22. The Petition suggested that judicial restraint and *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989), counsel against creating a Circuit split: only this Court can hold that *Miller v. Texas*, 153 U.S. 535 (1894); *Presser v. Illinois*, 116 U.S. 252 (1886); and *United States v. Cruikshank*, 92 U.S. 542 (1876), have been overtaken by *Heller* and by the twentieth-century's tectonic shifts in incorporation doctrine. Pet. 22. Tellingly, the County provides no real response to that point.

One of two outcomes can come of *Nordyke*: (1) the circuit split reemerges because the *en banc* court agrees with the panel decision, or (2) the court finds that *Rodriguez de Quijas* requires continued adherence to *Miller*, *Presser*, and *Cruikshank*, and a split cannot develop. Either way, the need for certiorari remains. Residents of the fifty States should not be forced to wait for a circuit to risk disobedience with this Court's decisions before they may enjoy the same liberties as District of Columbia residents.

3. The County leaves untouched the following points in the Petition: (i) the Fourteenth Amendment was adopted, in important part, to prevent the States from stripping citizens of the right to keep and bear arms for self-defense (Pet. 23-24); (ii) the Second Amendment is logically indistinguishable from the provisions in the Bill of Rights establishing personal rights that have been incorporated against the States (Pet. 24-25); and (iii) if the Court deems it prudent, this case could be consolidated with a grant of certiorari in the two pending petitions arising out of *National Rifle Association v. Chicago*, 567 F.3d 856 (7th Cir. 2009) (Pet. 25).

4. Nor does the County specifically contest the Petition's analysis regarding the Privileges or Immunities Clause: (i) the Clause was specifically intended to apply the personal rights in the Bill of Rights against the States (Pet. 30-31); (ii) the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), decision is fully consistent with applying the Second Amendment against the States (Pet. 31-33); (iii) later Supreme Court cases interpreting *Slaughter-House* either misconstrue it or have no bearing on whether the Second Amendment affords a right of

national citizenship (Pet. 34-36); and (iv) the Second Amendment must be deemed a right of national citizenship, and thus a protected privilege or immunity, because it was partly intended to protect local militias from federal incursion (Pet. 36).

5. The County tries to adopt by reference the arguments of Chicago and Oak Park in their opposition to certiorari in Nos. 08-1497 & 08-1521. Opp. 8 n.4, essentially conceding that if those petitions are granted, certiorari should also be granted here. But a Respondent cannot oppose certiorari by incorporating arguments made elsewhere. *See* S.Ct. R. 15.2 ("Counsel are admonished that they have an obligation to the Court to point out ***in the brief in opposition***, and not later, any perceived misstatement made in the petition.") (emphasis added).[1]

6. Implicitly conceding the cert-worthiness of this case, the County protests that the Seventh Circuit cases are equivalent vehicles for review. Opp. 6-7 & n.3. The County stresses that, like the New York statute, the Chicago and Oak Park ordinances also restrict possession of the relevant

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[1] The County argues that the Chicago and Oak Park opposition shows that the Second Amendment is not "implicit in the concept of ordered liberty," Opp. 8. n.4. The extensive historical review undertaken by the Court in *Heller* clearly shows that for the Founders, the English thinkers preceding them, and the legislators who debated the Fourteenth Amendment, the right of self-defense was not only "implicit" in the "concept of ordered liberty," but was indispensable to avoiding tyranny. *See, e.g.*, 128 S.Ct. at 2801 (citing FEDERALIST 29).

weapons. *Id.* at 7. But the County ignores that those ordinances ***do more*** than restrict possession in the home. *Id.* at n.3. Those ordinances restrict the ***carrying*** and ***registration*** of weapons, and thus implicate a much greater number of state and local enactments than this Petition. Pet. 25-27 & n.17. Certiorari can be granted here limited to whether the Second Amendment right ***to keep arms in the home*** applies against the States.

B. The County's Un-Adjudicated Claim That Nunchaku Are "Dangerous and Unusual" Provides No Basis for Denying Certiorari.

1. The County's anecdotes regarding the supposed special dangers of nunchaku are irrelevant, as that issue was not passed on below, and Petitioner had no opportunity to create a factual record. Nevertheless, to combat the misimpressions created in the Opposition, Petitioner notes as follows:

2. In contrast to the County's anecdotes and rhetoric, data from the Federal Bureau of Investigation ("FBI") and the Centers for Disease Control ("CDC") reveal that the dangers associated with nunchaku are far less than those associated with handguns, which *Heller* recognized as protected by the Second Amendment.

2a. According to the FBI's CRIME IN THE UNITED STATES, murder statistics reflect that in 2007 (the most recent available year) ***all forms of blunt weapons*** ("clubs, hammers, etc.") were used in 4.4% of murders. The FBI does not keep separate

statistics on nunchaku, obviously because their use in murders is *de minimis*.[2] By contrast, handguns were used in 49.6% of murders (68.0%, counting all firearms). Knives were used 12.1% of the time (nearly three times more often than blunt objects). Body parts ("hands, fists, feet, etc."), at 5.8%, were more likely to be used than blunt objects. The statistics for 2003-2006 were not appreciably different.[3] The data also reveal that there is no epidemic of criminal blunt weapon usage by youth: in 2007, blunt weapons were used in 1.0% of juvenile gang slayings, compared to 81.2% for handguns (92.2% for all firearms).[4]

Statistics for other crimes show a similar pattern. For instance, the FBI tracks usage of four kinds of "weapons" in robberies. In 2007, the percentage by weapon type used in robberies was: firearm 42.7%, "strong-arm" 40.0%, ***other weapon 9.1%*** (aggregating all forms of blunt weapons ***and*** non-

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[2] Pursuant to a note on the FBI's website to contact the Bureau directly about the availability of data not posted on their website, http://www.fbi.gov/ucr/word.htm, one of our researchers did so on September 2, 2009 and was informed that the FBI does not keep statistics on criminal use of nunchaku.

[3] FBI, 2007 CRIME IN THE UNITED STATES, ("2007 CRIME IN THE UNITED STATES ") http://www.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_07.html (Expanded Homicide Data Table 7, Murder Victims by Weapon, 2003-2007).

[4] *Id.* (Expanded Homicide Data Table 10, Murder Circumstances By Weapon), http://www.fbi.gov/ucr/cius2007/offenses/expanded_information/data/shrtable_10.html.

firearm weapons), and knife or other cutting instruments 8.3%.[5]

2b. Weapon safety data also fail to rebut the Petitioner's assertion in paragraph 26 of his complaint that "nunchaku, in comparison with most other arms, including firearms, is relatively safe and innocuous, such that a child or person untrained in the weapon's proper use would be unable to inflict serious injury." Pet. 51a.

The CDC maintains a site that can dynamically access its Web-based Injury Statistics Query and Reporting System ("WISQARS"), to show statistics for unintentional deaths by a range of causes or mechanisms. A query to that website for total unintentional deaths by firearm for 2004-2006 (the latest years available), returns the number 2,080. The corresponding number for unintentional cut or piercing deaths is 325.[6] A query for unintentional deaths caused by "non-firearm" weapons does not return a statistic.[7] Just as there is no demonstrable social problem concerning nunchaku use in crime, there is also no demonstrable safety problem.

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[5] 2007 CRIME IN THE UNITED STATES (Table 15, Crime Trends, Additional Information About Selected Offenses by Population Group, 2006-2007), http://www.fbi.gov/ucr/cius2007/data/table_15.html.

[6] WISQARS http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html.

[7] The CDC only keeps such statistics for suicides and homicides. WISQARS, Table 5.1.1, at http://www.cdc.gov/ncipc/wisqars/fatal/help/definitions.htm#cause.

Courts therefore cannot assume that nunchaku are especially dangerous.

2c. The County concedes that the test in *Heller* focuses on use of a particular weapon "at the time" of its use. Opp. 9. The FBI and CDC data show no present evidence of a serious nunchaku problem, especially in comparison with constitutionally-protected handguns. The New York Legislature's 1974 finding that nunchaku were "widely used by muggers and street gangs," Opp. 11, is thus obsolete, if it were ever true. The newspapers are not filled with stories of muggers or gangs bearing nunchaku for the simple reason, as the statistics bear out, that nunchaku are not a weapon of choice for criminals. And even if the Legislature's findings were entitled to full rational basis deference (a question not presented here), such findings can be set aside if they are irrational. *See, e.g., United States v. Morrison*, 529 U.S. 598, 614-15 (2000). Denial of certiorari would deprive Mr. Maloney of any opportunity to expose those findings as baseless.

3. The County argues that nunchaku are unique because they can deliver a powerful blow without the user feeling its force, Opp. 1, but the same is even more true of handguns. The County also argues that nunchaku strike with a force 200 times greater than required to break bones. *Id.* at 2. The point is self-evidently misleading.[8] as the swing of a golf club

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8 *Cf.* DARRELL HUFF, HOW TO LIE WITH STATISTICS 100 ("statisticulation") (1954).

generates more force than nunchaku,[9] yet not everyone hit by a golf club experiences a fracture. By contrast, handguns explode metal projectiles out of their barrels at speeds faster than the human eye can see, to penetrate deep into the body. David B. Adams, *Wound Ballistics*, 147 MILITARY MEDICINE 831-35 (1982).

Citing hyperbole about nunchaku cracking coconuts, Opp. 2, the County argues that nunchaku are deadly weapons. But that is not in dispute (though nunchaku are more frequently used in a non-lethal fashion, *see* complaint Pet. 51a). The same is true of any weapon worth wielding in self-defense. Kitchen knives can kill. A child's baseball bat can kill.

Nunchaku are also called "dreaded . . . garrote[s] from hell," Opp. 10. This is the kind of overblown balderdash that an evidentiary record could have readily dispelled had the complaint not been dismissed on the ground that the Second Amendment did not apply to the States. There is nothing magical in the power of two sticks connected by a cord. It is alarmism, at best, to suggest that there is any serious contemporary problem involving the use of nunchaku as a weapon of strangulation.

4. The County argues that nunchaku are "unusual," though the test the Court established in *Heller* requires that a weapon otherwise meeting the definition of an "arm" be "dangerous ***and*** unusual"

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9 http://www.howstuffworks.com/golf-club.htm/printable (average golf swing generates "nearly 3,000 pounds of force").

to lose protected status. Beyond the fact that this question is not presented by this case in its current posture, the demonstration above that nunchaku are not unusually dangerous should suffice to dispose of the County's argument. In any event, nunchaku are not unusual in the constitutionally-intended sense. The martial arts have become extremely popular in the United States and around the world. Practitioners are not uncommon. The Olympic-affiliated World Nunchaku Association calls "nunchaku-do a well-known martial art." http://www.nunchaku.org/. The popularity of nunchaku has only grown since 1974, when New York's own Criminal Services Division stated that "[i]n view of the current interest and participation in [such] activities by ***many members of the public***, it appears unreasonable—and perhaps even unconstitutional—to prohibit those who have a legitimate reason for possessing chuka sticks from doing so." Pet. 78a (emphasis added).

Surely, taken as a group, martial arts weapons are thus undoubtedly not "uncommon." An entire form of recreation and physical fitness should not be hampered, under pain of criminal sanction, by atomizing the types of weapons used for training and exercise, anymore than handguns could be broken down by make, model, or color, and thereby stripped of constitutional protection. Numerous types of nunchaku, including toy versions for children, are

available on Shopping.com, Amazon.com, and elsewhere.[10]

The County's anecdotal material self-refutes the claim that martial arts weapons are "uncommon" in the United States. The County's principal source is MARTIAL ARTS FOR DUMMIES. Opp. 12 n.8. The best-selling series of bright-yellow DUMMIES books is designed to instruct uninitiated readers about topics of widespread interest. The "dangerous and unusual" precedent in the lower courts should, and likely will, evolve based on data and analysis, *see, e.g.*, *Chambers v. United States*, 129 S.Ct. 687, 693 (2009) (using data to determine whether "failure to report" is a "violent felony"), instead of a stray, purple-prose reference in MARTIAL ARTS FOR DUMMIES. For instance, courts may construe the unprotected category of weapons to include weapons of mass destruction, explosives, weapons designed to be hidden in common objects or to conceal evidence of their use, and the like. Nunchaku are simply not in that class of questionable or intensely destructive weapons. The examples the County cites from the sparse post-*Heller* case law, involving pipe bombs, machine guns, and silencers, show the courts to be proceeding in just such a reasonable fashion. Opp. 9 n.6.

5. Finally, the County does not dispute that clubs and even articulated clubs were long recognized as soldiers' weapons. Pet. 27. The most common

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10 *See* http://www.shopping.com/xCC-Nunchaku; and http://www.amazon.com/s/ref=nb_ss?url=search-alias%3Daps&field-keywords=nunchaku.

articulated club is a flail (larger and more dangerous than nunchaku), which arose from farming. "The old agricultural flail, consisting of an iron shod club hinged to a long staff, needed no modification to turn it into a very formidable weapon. It was widely used for this purpose by foot soldiers, usually peasant levies, from not later then the thirteenth century until the second half of the seventeenth century." CLAUDE BLAIR, EUROPEAN AND AMERICAN ARMS C. 1100-1850, at 24 (1962). Accordingly, flails and other articulated clubs have a historical relationship to the preservation or efficiency of a well-regulated militia. *Compare* Opp. 15.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

Respectfully submitted,

JEFFREY BOSSERT CLARK
Counsel of Record
WILLIAM E. BESTANI
KATHARINE M. BURKE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, N.W.
Washington, D.C. 20005
202-879-5000

Counsel for Petitioner
James M. Maloney

Of Counsel

James M. Maloney
33 Bayview Avenue
Port Washington, NY
11050
(516) 767-1395

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AMICUS CURIAE BRIEF

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JAMES M. MALONEY,

Petitioner,

v.

KATHLEEN A. RICE,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF FOR THE NRA CIVIL RIGHTS DEFENSE FUND AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

E. Duncan Getchell
Counsel of Record
J. Robert Brame
Matthew D. Fender
Les S. Bowers
McGUIREWOODS LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219
(804) 775-1000

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iv

I. Interest of the Amicus 1

II. Why a Writ Should be Granted 3

A. There is a Split Between the Circuits on an Issue of National Importance at a Time When Lower Courts are in Need of Definitive Guidance 3

B. Additional Reasons to Grant a Writ: the Right to Keep and Bear Arms was a Core Interest of the Fourteenth Amendment and That Interest Should be Clearly Established in a Time of Uncertainty 8

1. The Drafters of the Fourteenth Amendment Sought to Overrule Barron and Dred Scott 8

2. The 39th Congress Explicitly Targeted the Black Codes Passed by Southern States 11

TABLE OF CONTENTS
(continued)

Page

3. The Drafters of the Fourteenth Amendment were Particularly Interested in Second Amendment rights 13

4. Congressional Debate During the Passage of the Civil Rights Act and the First and Second Freedmen's Bureau Bills Further Confirms that the Congress Considered the Right to Keep and Bear Arms Fundamental to the Liberty of Freedmen..... 15

5. The Court's Precedent Dealing with the Application of the Second Amendment to the States is Doctrinally Unsound and of Limited Relevance..... 16

TABLE OF CONTENTS
(continued)

Page

6. This Case Provides a Vehicle for Determining that the Second Amendment also Operates Against the States Under the Privileges or Immunities Clause 18

7. The Court's Due Process Jurisprudence Compels the Conclusion that the Second Amendment is Incorporated by the Fourteenth Amendment Due Process Clause 22

CONCLUSION **25**

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833) 5, 8

District of Columbia v. Heller, 128 S. Ct. 2783 (2008) ..... passim

Duncan v. Louisiana, 391 U.S. 145 (1968) 23

Maloney v. Cuomo, 554 F.3d 56 (2d Cir. 2009) 5, 6

Miller v. Texas, 153 U.S. 535 (1894) 6, 18

National Rifle Association v. City of Chicago, 567 F.3d 856 (7th Cir. 2009) 4, 24

Nordyke v. King, 563 F.3d 439 (9th Cir. 2009) 4, 6, 23

Presser v. Illinois, 116 U.S. 252 (1886) 1, 4, 17

Saenz v. Roe, 526 U.S. 489 (1999) 19

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857) 8, 21, 22

Silveira v. Lockyer, 312 F.3d 1052 (9th Cir. 2003) 18

The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) 18, 19

United States v. Cruikshank, 92 U.S. 542 (1875) 1, 6, 17

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

Commonwealth v. Bolduc, No. 0825 CR 2026, Barnstable District Court (Massachusetts Feb. 19, 2009) 4

People v. Perkins, 2009 NY Slip Op 3962 (N.Y.A.D. 3 Dept. 2009) 4

State v. Turnbull, No. A08-0532, 2009 Minn. App. LEXIS 93 (Minn. June 2, 2009) 4

FEDERAL: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

Gun Control Act, 18 U.S.C. § 921 et seq. (2006) 3

National Firearms Act of 1934, 26 U.S.C. § 5801 *et seq*. (2006) 3

STATE: STATUTES, RULES, REGULATIONS, CONSTITUTIONAL PROVISIONS

Ark. Const. of 1836, Article II, § 21 12

Fla. Const. of 1838, Article I, § 21 12

Tenn. Const. of 1796, Article I, § 26 ..... 11, 12

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TABLE OF AUTHORITIES
(continued)

Page

Act of Dec. 17, 1861, ch. 1291, § 11, 1861 Fla. Laws 38, 40 11,12

Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44 11,12

Act of Dec. 10, 1825, § 9, 1825 Acts of Fla. 52, 55 11,12

An Act to Govern Patrols, § 8, 1825 Acts of Fla. 52, 55 11,12

Act of Dec. 23, 1833, § 7, 1833 Ga. Laws 226, 228 13

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Act of Mar. 14, 1832, ch. 323, § 6, 1832 Laws of Md. 448. 13

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TABLE OF AUTHORITIES
(continued)

Page

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Act of Mar. 15, 1832, ch. 22, § 4, 1832 Acts of Va. 21..... 13

OTHER AUTHORITIES

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866) .....passim

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Albion Tourgée, *The Invisible Empire* (Louisiana State Univ. Press 1989) (1880)..... 12

Federal Bureau of Investigation, Table 29-Crime in the United States 2007, http://www.fbi.gov/ucr/cius2007/data/table_29.html (Last Visited June 11, 2009) 4

The NRA Civil Rights Defense Fund (the "Fund"), by and through the undersigned counsel, by consent of the parties, submits its brief amicus curiae respectfully praying the Court to grant the Petitioner a writ of certiorari. In support of the petition, the Fund states as follows:

I. Interest of the Amicus[1]

The issue presented by this case – whether the Second Amendment is incorporated into the Due Process Clause of the Fourteenth Amendment or otherwise applies via the Privileges or Immunities Clause – implicates rights that are fundamental to the concept of ordered liberty as understood by the Framers of the Constitution and the drafters of the Fourteenth Amendment. Although there are post-Reconstruction decisions[2] holding that the Second Amendment is not applicable against the states, no one believes that the analysis in these decisions accurately reflects current doctrine. Furthermore, conflicts have now arisen among the circuits

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[1] Pursuant to Sup. Ct. R. 37.6, your amicus certifies that no counsel for either party authored any part of this brief and that no person, other than the amicus and its counsel, made a monetary contribution intended to fund the preparation of the brief. In accord with Sup Ct. R. 37.2 the amicus certifies that counsel of record for both parties have been notified more than ten days before filing of the amicus' intention to file the brief and have given their consent.

[2] *See* Presser v. Illinois, 116 U.S. 252 (1886); United States v. Cruikshank, 92 U.S. 542, 553 (1875).

concerning the continued vitality of those cases necessitating, guidance from this Court.

The National Rifle Association (the "NRA") is America's oldest civil rights organization and is widely recognized as America's foremost defender of the Second Amendment. The NRA was founded in 1871 by Union generals who, based on their experiences in the Civil War, desired to promote marksmanship and expertise with firearms among the citizenry. Today, the NRA has over four million members and its programs reach millions more. The NRA is America's leading provider of firearms marksmanship and safety training for both civilians and law enforcement.

Amicus curiae the NRA Civil Rights Defense Fund was established by the NRA in 1978 for purposes that include assisting in the assertion and defense of the natural, civil, and constitutional rights of the individual to keep and bear arms in a free society. To accomplish this, the Fund provides legal and financial assistance to individuals and organizations defending their right to keep and bear arms. The Fund has a significant interest in the issues at stake in this case because the arguments made by the Respondents, if accepted by this Court, would limit the very rights the Fund was created to protect.

II. Why a Writ Should be Granted

A. There is a Split Between the Circuits on an Issue of National Importance at a Time When Lower Courts are in Need of Definitive Guidance.

In June 2008 this Court issued its historic opinion in *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008). *Heller* found that the Second Amendment to the United States Constitution guarantees an individual right to keep and bear arms and invalidated a District of Columbia law broadly banning possession of a handgun in the home. *Id.* at 2821-22. What the Court did not resolve in *Heller*, however, is the question whether, and to what extent, the right to keep and bear arms secured by the Second Amendment restricts the police power of state governments. That issue is squarely presented by Petitioner Maloney.

For most of the history of the United States, the regulation of weapons has been a matter addressed, when it was addressed at all, by state and local governments. The first substantial foray into gun control by the federal government occurred with the National Firearms Act of 1934. 26 U.S.C. § 5801 *et seq.* (2006) (original version at ch. 757, 48 Stat. 1236 (1934)). In 1968, Congress passed the Gun Control Act, 18 U.S.C. § 921 *et seq.* (2006), which incorporated the National Firearms Act and expanded the scope of federal regulation. 18 U.S.C. § 921 *et seq.* (2006). Despite the more comprehensive nature of that enhanced regulatory scheme,

enforcement activity by Federal authorities is dwarfed in comparison to the vast number of prosecutions for violation of state and local weapons laws each year[3]. Countless cases are disposed of each year by courts not of record, and the number of citizens whose exercise of their right to keep and bear arms is restricted by state and local statutes is indeterminate.

In the wake of the *Heller* decision, state courts as well as lower federal courts have been confronted with Second Amendment challenges to state and local statutes.[4] While some courts considering these challenges have correctly held that the Second Amendment acts as a restriction on the states as well as on the federal government, other courts, including the Second Circuit panel below, have adhered to doctrinally-superseded precedent and concluded that the Second Amendment is not implicated in challenges to state and local laws.

In the decision below, the Second Circuit panel relied on this Court's opinion in *Presser v. Illinois*, 116 U.S. 252 (1886). The Court in *Presser*

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[3] The FBI reports that in 2007, there were 188,891 arrests nationwide for the category of offenses it describes as "Weapons; carrying, possessing, etc." Federal Bureau of Investigation, Table 29 – Crime in the United States 2007, http://www.fbi.gov/ucr/cius2007/data/table_29.html (Last Visited June 11, 2009)

[4] *See, e.g.*, Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856 (7th Cir. 2009); Nordyke v. King, 563 F.3d 439 (9th Cir. 2009); State v. Turnbull, No. A08-0532, 2009 Minn. App. LEXIS 93 (Minn. June 2, 2009); People v. Perkins, 2009 NY Slip Op 3962 (N.Y.A.D. 3 Dept. 2009); Commonwealth v. Bolduc, No. 0825 CR 2026, Barnstable District Court (Mass. Feb. 19, 2009).

held only that the Second Amendment did not, of its own accord, limit the power of the State of Illinois. *Id.* at 265. This holding merely restated the well-established antebellum principle from *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250 (1833), in which this Court held that the Bill of Rights only acted as a restriction upon the power of the Federal Government. *Presser* failed to undertake even a cursory incorporation analysis, instead relying upon a decision handed down decades before the ratification of the Fourteenth Amendment.

The ruling below is part of a split between the Courts of Appeals on the question whether, in light of *Heller*, the Second Amendment limits the ability of state and local governments to enact and enforce restrictions on arms. In the case presented here, the Second Circuit declined to enforce the individual right to keep and bear arms protected by the Second Amendment, holding that "[i]t is settled law, however, that the Second Amendment applies only to limitations the federal government seeks to impose." *Maloney v. Cuomo*, 554 F.3d 56, 58 (2d Cir. 2009). Further, the court below held that

> to the extent that Heller might be read to question the continuing validity of this principle, we 'must follow *Presser*' because '[w]here, as here, a Supreme Court precedent has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

> case which directly controls, leaving the Supreme Court the prerogative of overruling its own decisions.'

Id. at 59 (*quoting Bach v. Pataki*, 408 F.3d 75, 86 (2d Cir. 2005)).

In *Nordyke v. King*, 563 F.3d 439 (9th Cir. 2009), however, the Ninth Circuit issued a contrary ruling. There, the court held: "We are therefore persuaded that the Due Process Clause of the Fourteenth Amendment incorporates the Second Amendment and applies it against the states and local government." *Id.* at 457. The Ninth Circuit correctly held that it was not constrained by *Presser* or by *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), in considering the question of whether the Second Amendment is incorporated by the Fourteenth Amendment Due Process Clause: "*Cruikshank* and *Presser* involved direct application and incorporation through the Privileges or Immunities Clause, but not incorporation through the Due Process Clause." 563 F.3d at 448.

In *National Rifle Ass'n v. City of Chicago*, 567 F.3d 856 (7th Cir. 2009), the Seventh Circuit, confronted with numerous challenges to local laws nearly identical to the ordinance struck down in *Heller*, held that the Second Amendment does not restrict the power of the State of Illinois and its political subdivisions. Relying on *Presser*, *Cruikshank*, and *Miller v. Texas*,[5] the court rejected arguments that the Second Amendment restricts

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[5] 153 U.S. 535 (1894).

state power via either the Fourteenth Amendment Privileges or Immunities Clause or the Due Process Clause. *Id.* at 857. The court wrote: "[r]epeatedly, in decisions that no one thinks fossilized, the Justices have directed trial and appellate judges to implement the Supreme Court's holdings even if the reasoning in later opinions has undermined their rationale." *Id.* at 857.

This clear split of authority leaves the law in disarray and invites review by the Court. Furthermore, it is likely that lower courts will continue to be divided on this important question until this Court provides a definitive answer. In *Heller*, the Court specifically reserved the question: "With respect to *Cruikshank*'s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later cases." *Heller*, 128 S. Ct. at 2813 n.23. Now, however, the important question whether the Second Amendment restricts state power via the Fourteenth Amendment is fully ripe for consideration by the Court.

B. Additional Reasons to Grant a Writ: the Right to Keep and Bear Arms was a Core Interest of the Fourteenth Amendment and That Interest Should be Clearly Established in a Time of Uncertainty.

1. The Drafters of the Fourteenth Amendment Sought to Overrule *Barron* and *Dred Scott*.

In the antebellum period, this Court's doctrine was that the states were not bound by the Bill of Rights. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243 (1833). Further, in 1857, the Court held that people of African descent were not citizens in a constitutional sense. *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). The Fourteenth Amendment was squarely aimed at overturning these two cases. It was a bedrock doctrine of Republican constitutional theory that the Constitution should be interpreted in light of the Declaration of Independence. *See* Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party Before the Civil War* 76, 133, 290 (Oxford University Press 1970).

In *Barron*, Chief Justice Marshall stated that, "[h]ad the framers of these amendments [the Bill of Rights] intended them to be limitations on the powers of the state governments, they would have imitated the framers of the original constitution, and have expressed that intention." *Barron*, 32 U.S. at

250. John Bingham, one of the key drafters of the Fourteenth Amendment, set out to do precisely that.

> [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it, are secured to the citizen solely as a citizen of the United States and as a party in their courts. They do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them, and it has been repeatedly held that the restriction contained in the Constitution against the taking of private property for public use without just compensation is not a restriction upon State legislation, but applies only to the legislation of Congress.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866).

Noting that it had been the "want of the Republic that there was not an express grant of power [enabling] the whole people, of every State ... to enforce obedience to ... the Constitution," Rep. Bingham appealed to the Constitutional theories of his party when he said:

> [T]he amendment proposed stands in the very words of the Constitution of the United States as it came to us from

> the hands of its illustrious framers. Every word of the proposed amendment is to-day in the Constitution of our country, save the words conferring the express grant of power upon the Congress of the United States.

Cong. Globe, 39th Cong., 1st Sess. 1034 (1866). Thus, the Fourteenth Amendment must be deemed a self-conscious attempt to reverse *Barron*. The incorporationist impulse underlying the Fourteenth Amendment may also be seen in the statement of Senator Howard: "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

The Republican drafters of the Fourteenth Amendment recognized that, without a mechanism by which they could restrain the power of the states to infringe upon the civil liberties of the freedmen, slavery could continue indefinitely as a *de facto* regime. As Rep. Woodbridge noted, "if Congress does not do something to provide for these people, if they do not prove equal to their duty, and come up to their work like men, the condition of those people will be worse than it was before." Cong. Globe, 39th Cong., 1st Sess. 1088 (1866). The proposed Fourteenth Amendment therefore provided Congress with the power "to enact those laws which will give to a citizen of the United States the natural rights which necessarily pertain to citizenship." *Id.* The

"condition of the freedmen," he concluded, "demands the adoption of this resolution." *Id.*

2. The 39th Congress Explicitly Targeted the Black Codes Passed by Southern States.

The drafters of the Fourteenth Amendment were plainly concerned that the southern states were attempting to continue the antebellum system of slavery through the enactment or perpetuation of Black Codes. These laws substantially restricted the civil rights of the Freedmen, including their rights of free speech, to assemble, to keep and bear arms, and to pursue a trade. For example, a Florida statute, first enacted in 1825 and reauthorized in 1847 and 1861, provided that militia patrols "shall enter into all negroes houses and suspected places, and search for arms and other offensive or improper weapons, and may lawfully seize and take away all such arms, weapons, and ammunition." An Act to Govern Patrols, § 8, 1825 Acts of Fla. 52, 55; Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44; ch. 1291, § 11, 1861 Fla. Laws 38, 40.

In Tennessee, a state constitutional amendment stated that "the free *white men* of this State have a right to keep and bear arms for their common defence." Tenn. Const. of 1796, art. I, §26. A Mississippi statute declared that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any

ammunition." Act of Nov. 29, 1865, ch. 23, § 1, 1865 Laws of Miss. 165.

When recalcitrant southern states sought to continue slavery *de facto*, "almost universally the first thing done was to disarm the negroes and leave them defenceless." Albion Tourgée, *The Invisible Empire* 54-55 (Louisiana State Univ. Press 1989) (1880). Because northern Republicans were fully aware that the occupation of the South by the Army could not continue indefinitely, they viewed limitations on the right of freedmen to defend themselves as a challenge to Reconstruction. The ultimate effect of these laws, as Representative Eliot noted in debate over the second Freedmen's Bureau Bill, was to leave blacks "defenseless, for the civil-law officers disarm the colored man and hand him over to armed marauders." Cong. Globe, 39th Cong., 1st Sess. 2775 (1866).[6] Something had to be done about it.

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[6] Laws limiting the right to keep and bear arms were ubiquitous before the war and remained on the books. *See, e.g.*, Ark. Const. of 1836, art. II, §21; Fla. Const. of 1838, art. I, §21 (both declaring "[t]hat the free white men of this State shall have a right to keep and to bear arms for their common defence"); Tenn. Const. of 1796, art. I, §26 (providing that only "free white men" had the right to bear arms); "An Act to prevent the use of fire arms by free negroes," ch. 176, §1, 1832 Laws of Del. 180 (imposing a five dollar fine on free blacks carrying guns); Act of Dec. 17, 1861, ch. 1291, § 11, 1861 Fla. Laws 38, 40 (reauthorizing patrols to enter homes of blacks to seize weapons); Act of Jan. 6, 1847, ch. 87, § 11, 1846 Fla. Laws 42, 44 (reauthorizing patrols); Act of Dec. 10, 1825, § 9, 1825 Acts of Fla. 52, 55 (allowing slaves to carry guns outside the presence of whites only if they possessed a one-week renewable license); An Act to Govern Patrols, § 8, 1825 Acts of Fla. 52, 55 (stating that white patrols "shall

3. The Drafters of the Fourteenth Amendment were Particularly Interested in Second Amendment rights.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second

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enter into all negro houses . . . and search for arms . . . and may lawfully seize and take away all such arms, weapons, and ammunition"); Act of Dec. 23, 1833, § 7, 1833 Ga. Laws 226, 228 (declaring that "it shall not be lawful for any free person of colour in this state, to own, use, or carry fire arms of any description whatever"); Black Code, ch. 33, §§ 19-20, Laws of La. 150, 160 (1806); (allowing slaves to carry firearms, but only for the very limited purpose of hunting on his owner's property); Act of Mar. 14, 1832, ch. 323, §6, 1832 Laws of Md. 448 (prohibiting free blacks from carrying firearms); Act of Nov. 29, 1865, ch. 23, § 1, 1865 Laws of Miss. 165 (declaring that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind, or any ammunition"); Act of Mar. 15, 1852, ch. 206, 1852 Miss. Laws 328 (repealing Act of June 18, 1822, ch. 73, §§ 10, 12, 1822 Miss. Laws 179, 181-83, which allowed slaves and free blacks to obtain licenses to carry firearms); Act of Dec. 18, 1819, 1819 Acts of S.C. 31 (requiring that slaves carrying firearms be in the presence of whites or have the permission of their owners, unless the slave was hunting or guarding his owner's property); "An Act Concerning Slaves," § 6, 1840 Laws of Tex. 171, 172 (prohibited slaves from using firearms at all); Act of Dec. 3, 1850, ch. 58, §1, 1850 Laws of Tex. 42-44 (imposing a penalty of between 39 and 50 lashes on slaves caught carrying firearms); Act of Mar. 15, 1832, ch. 22, § 4, 1832 Acts of Va. 21 (providing that "[n]o free negro or mulatto shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead; and any free negro or mulatto who shall so offend shall . . . be punished with stripes . . . not exceeding thirty-nine lashes").

Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly freed slaves." *Heller*, 128 S.Ct. at 2809-10 (*citing* Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876*, (Praeger 1998)). Indeed, those opposing the disarmament of blacks after the Civil War "frequently stated that they [laws disarming blacks] infringed blacks' constitutional right to keep and bear arms." *Id.* at 2810.

Statesmen of the period endorsed the view that ensuring that the freedmen retained the right to keep and bear arms was critical to their overall freedom. Senator Pomeroy, in debate before the Senate, stated:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable – 1. Every man should have a homestead ... 2. He should have the right to bear arms for the defense of himself and family and his homestead ... 3. He should have the ballot.

Cong. Globe, 39th Cong., 1st Sess. 1182.

When Senator Jacob Howard introduced the Fourteenth Amendment in the Senate, he explained that the Privileges or Immunities Clause secured all the privileges and immunities guaranteed in Article IV §2 as well as the rights secured by the Bill of Rights:

> To these privileges and immunities . . . should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and of the press; the right of the people peaceably to assemble and petition the Government for a redress of grievances. . . [and] the right to keep and to bear arms.

Cong. Globe, 39th Cong., 1st Sess. 2765 (1866). The framers of the Fourteenth Amendment could hardly have expressed a clearer intent that the Amendment should secure the Second Amendment right to keep and bear arms against state infringement, and the Court should grant review to settle this issue.

4. Congressional Debate During the Passage of the Civil Rights Act and the First and Second Freedmen's Bureau Bills Further Confirms that the Congress Considered the Right to Keep and Bear Arms Fundamental to the Liberty of Freedmen.

As the Court noted in *Heller*, the second Freedmen's Bureau Bill secured constitutional liberties for all freedmen, "including the constitutional right to bear arms...". *Heller*, 128 S. Ct. at 2810 (*quoting* 14 Stat. 176-177 (1866)). During debate over the Freedmen's Bureau Bill and the 1866 Civil Rights Bill, Representative Zachariah Chanler stated that "[t]he right of the people to keep

and bear arms must be so understood as not to exclude the colored man from the term people." Cong. Globe, 39th Cong., 1st Sess. 217 (1871). Senator Charles Sumner also stated that the freedmen "should have the constitutional protection in keeping arms." Cong. Globe, 39th Cong., 1st Sess. 337 (1866). Ultimately, the Freedmen's Bureau Bill was passed by both houses of Congress in a form which protected

> any of the civil rights or immunities belonging to white persons, including the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms
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> . . .

Cong. Globe, 39th Cong., 1st Sess. 1292 (1866).

5. The Court's Precedent Dealing with the Application of the Second Amendment to the States is Doctrinally Unsound and of Limited Relevance.

In 1876, relying upon the *Slaughter-House Cases*, the Court refused to find that the right to keep and bear arms was covered by the Privileges or Immunities Clause because it "is not in any manner dependent upon [the Constitution] for its existence."

U.S. v. Cruikshank, 92 U.S. 542, 553 (1876). Nevertheless, the Court, "in the course of vacating the convictions of members of a white mob for depriving blacks of their right to keep and bear arms," *Heller*, 128 S. Ct. at 2812, held that the Second Amendment "is one of the amendments that has no effect other than to restrict the power of the national government...." *Cruikshank*, 92 U.S. at 553. The Court's pronouncement on the Second Amendment comprised only one paragraph and failed to undertake *any* incorporation analysis.

In *Cruikshank,* the Court held that freedmen had to "look [to the state through its exercise of the police power] for their protection against any violation by their fellow-citizens." *Id.* at 553. This reasoning completely ignored the realities that prompted the passage of the Fourteenth Amendment, the 1866 Civil Rights Act, and both of the Freedmen's Bureau Bills: that the freedmen in the South (as well as free blacks in the North) were being systematically disarmed and subjugated by the very state governments to which the *Cruikshank* court required them look to for protection. *See* Charles Lane, *The Day that Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Henry Holt & Co. 2008).

In 1886, the Court, citing the *Slaughter-House Cases*, *Cruikshank*, and even *Barron* (which, as noted above, the drafters of the Fourteenth Amendment explicitly intended to overturn), repeated the conclusory holding in *Cruikshank* that the Second Amendment applied only to limit the national government. *Presser v. Illinois*, 116 U.S.

252, 265 (1886). Once again the Court did not engage in incorporation analysis. Moreover, the *Presser* Court suggested that the First, Fifth, and Sixth Amendments also had no effect upon the states. *Id.* "*Cruikshank* and *Presser* rest on a principle that is now thoroughly discredited." *Silveira v. Lockyer*, 312 F.3d 1052, 1067 (9th Cir. 2003).

Miller v. Texas is even less to the point. There, the Court, citing *Barron*, did state that "it is well settled that the restrictions of [the Second Amendment] operate only upon the Federal power, and have no reference whatever to proceedings in state courts." 153 U.S. 535, 538 (1894). However, the Court did not reach incorporation, holding that the issue could not be raised "for the first time in a petition for rehearing after judgment." *Id.* at 539.

6. This Case Provides a Vehicle for Determining that the Second Amendment also Operates Against the States Under the Privileges or Immunities Clause.

In 1873, the Court first ruled on the meaning of the Fourteenth Amendment in *The Slaughter-House Cases*. There, the majority held, in the face of overwhelming contrary legislative history, that the Privileges or Immunities Clause guaranteed only rights of national as opposed to state citizenship. *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1873). In order to be faithful to the textual distinctions in the amendment between the two

levels of citizenship, and supposing a lack of intent to radically alter the federal architecture of the original Constitution, the majority concluded that privileges and immunities of state citizenship included all the natural and fundamental rights for which government in general is created to protect.

The privileges and immunities of national citizenship on the other hand were found to be limited to rights historically dependent on the existence of a national government. These include the right to "the care and protection of the federal government over his life, liberty and property when on the high seas or within the jurisdiction of a foreign government;" the right to habeas corpus in federal court; and the right to use the navigable waters of the United States. *Id.* at 79. In so holding, the Court limited the Privileges or Immunities Clause, originally intended to include, at a minimum, "the personal rights guarantied and secured by the first eight amendments of the Constitution," Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), to but a few rights whose exercise were usually noncontroversial.

Though considerable debate remains over the meaning of the Privileges or Immunities Clause of the Fourteenth Amendment, it has been forcefully observed that, "legal scholars agree ... that the Clause does not mean what the Court said it meant in 1873." *Saenz v. Roe*, 526 U.S. 489, 523 n.1 (1999) (Thomas, J., dissenting).

For this there is considerable historical support. As Rep. Bingham stated during the House debate on the Fourteenth Amendment:

> The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee and taught to all the people of this country by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country, which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by express authority of the Constitution to do that by congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction whenever the same shall be abridged or denied by the unconstitutional acts of any State.

Cong. Globe, 39th Cong., 1st Sess. 2542 (1866).

It would not be necessary to reverse the holding in *The Slaughter-House Cases* for the

Privileges or Immunities Clause to provide an additional basis for finding that the Second Amendment right to keep and bear arms is a restriction on state power. Accepting as established the argument that federal privileges and immunities do not include rights that were antecedently protected by the states, the right to keep and bear arms, *as applied to the freedmen*, was not such a right. *Heller* makes it clear that a right to keep and bear arms was such a right for the majority of the population. However, this right was recognized in a discriminatory regime. In England, the Bill of Rights protected only the right of protestant Christians to keep and bear arms. 128 S.Ct. at 2798 (quoting 1 W. & M., c.2 §7, in 3 Eng. Stat. at Large 441 (1689)). In America, both before and after the revolution, the right was widely limited by race. For example, in 1680, an act of the Virginia General Assembly declared it illegal for slaves to carry offensive or defensive weapons—even so much as a staff—without prior written permission. 2 Hennings Va. Stat. at Large at 481.

There are numerous other antebellum and postbellum laws disarming blacks, but the most telling authority is found in *Scott v. Sanford*, 60 U.S. (19 How.) 393 (1857). A key syllogism in *Dred Scott* was that the founders could not have intended those of African descent to be citizens in the constitutional sense because that would give them the privileges and immunities of citizenship including the right "to keep and carry arms wherever they went." *Id.* at 416-17. For Chief Justice Taney, it was "impossible. . . to believe that the great men of the slaveholding

states, who took so large a share in framing the Constitution of the United States, and exercised so much influence in procuring its adoption, could have been so forgetful or regardless of their own safety and the safety of those who trusted and confided in them. *Id.* at 417.

It was in light of the limited nature of the antebellum right to keep and bear arms that the framers of the Fourteenth Amendment drafted and debated its text. As shown above they intended to extend the right to the freedmen. This created a new right of United States citizens—a right to keep and bear arms that applied to all citizens, regardless of race or creed. This right, which in its full scope had never been a right of the citizens of the several states, can be found to reside in the Privileges or Immunities Clause even as interpreted by *the Slaughter House Cases*. If it is accepted that a core purpose of the Fourteenth Amendment was to reverse *Dred Scott*, it should also be accepted that one of its particular purposes was to overturn Chief Justice Taney's syllogism.

7. The Court's Due Process Jurisprudence Compels the Conclusion that the Second Amendment is Incorporated by the Fourteenth Amendment Due Process Clause.

The idea that the no provision of the Bill of Rights applied to the States – the fundamental premise upon which *Cruikshank* and *Presser* were

based – is "a position long since repudiated." *Duncan v. Louisiana*, 391 U.S. 145, 155 (1968). As previously noted, *Cruikshank* and *Presser* expressly relied upon a constitutional theory that has been wholly discredited by over 100 years of decisional law. Heller strongly suggests that an incorporation analysis of the Second Amendment is required to determine if it restricts state power: "*Cruikshank* also said that the *First Amendment* did not apply against the States and did not engage in the sort of *Fourteenth Amendment* inquiry required by our later cases." *Heller*, 128 S.Ct. at 2813 n.23.

In *Nordyke*, the Ninth Circuit performed an incorporation analysis and relied upon this Court's substantive due process jurisprudence, reasoning that "incorporation is logically a part of substantive due process." *Nordyke*, 563 F.3d at 450. The *Nordyke* Court thus asked whether the Second Amendment right to keep and bear arms was "deeply rooted in this Nation's history and tradition." 563 F.3d at 450, (*quoting Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997)). The court answered this question in the affirmative.

Heller explained that the phrase "necessary to the security of a free State," as found in the prefatory clause of the Second Amendment, means "necessary to the security of a free polity." *Heller*, 128 S. Ct. at 2800 (internal quotation marks omitted). Thus, as the Ninth Circuit held in *Nordyke*, "the text of the Second Amendment already suggests that the right it protects relates to an institution ... which is 'necessary to an Anglo-

American regime of ordered liberty'" *Nordyke*, 563 F.3d at 451 (*quoting Duncan*, 391 U.S. at 149 n.14).

Heller also set forth numerous grounds for regarding the right to keep and bear arms as one of the fundamental rights deeply rooted in our history and tradition. The same historical underpinnings that support the individual character of the right also demonstrate that it is fundamental. First, the right is "useful in repelling invasions and suppressing insurrections. Second, it renders large standing armies unnecessary .... Third, when the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny." *Heller*, 128 S. Ct. at 2800-01.

Heller also explicitly relied upon the fundamental human right to self-defense: "[T]he inherent right of self-defense has been central to the Second Amendment right." *Id.* at 2817. The Court in *Heller* invalidated the District of Columbia's ordinance that required all firearms to be rendered and kept inoperable at all times, noting that the requirement made "the core lawful purpose of self-defense" impossible and was therefore unconstitutional. *Id.* at 2818. This language forecloses any assertion, as argued in dicta by the Seventh Circuit in *National Rifle Ass'n v. City of Chicago*, that the inherent right to self-defense is subject to modification – and even elimination—by the impulses of local legislative majorities.[7]

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[7] Cf. Nat'l Rifle Ass'n v. City of Chicago, 567 F.3d 856, 859 (7th Cir. 2009) (arguing in dicta that a state could effectively

The Court should not delay in granting a writ. This is an appropriate case that will serve as a vehicle to ensure that an important purpose of the Fourteenth Amendment—to secure the fundamental right to keep and bear arms—is not frustrated by allowing that right to be reevaluated or eliminated by state or local legislative majorities.

CONCLUSION

Therefore, because the question of whether the Second Amendment restricts the power of the states is one of national importance, because there is a clear split of authority, and because a core purpose of the Fourteenth Amendment is in need of clarification, *amicus curiae* NRA Civil Rights Defense Fund respectfully requests that this Court grant Petitioner's petition for a *writ of certiorari*.

RESPECTFULLY SUBMITTED,

E. Duncan Getchell
Counsel of Record
J. Robert Brame
Matthew D. Fender
Les S. Bowers
McGuireWoods LLP
One James Center
901 E. Cary St.
Richmond, VA 23219
(804) 775-1000

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achieve the same ends sought by the District of Columbia in *Heller* by enacting policies designed to ensure that "burglars were deterred by the criminal law rather than self-help.")